# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1940 ~~1940~~ 1941

No. ~~781~~ 28

CLOVERLEAF BUTTER COMPANY, PETITIONER,

*vs.*

HAYGOOD PATTERSON, AS COMMISSIONER OF AGRICULTURE AND INDUSTRIES OF THE STATE OF ALABAMA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 21, 1941.

CERTIORARI GRANTED APRIL 7, 1941.

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1940

# No. 781

CLOVERLEAF BUTTER COMPANY, PETITIONER,

*vs.*

HAYGOOD PATTERSON, AS COMMISSIONER OF AGRICULTURE AND INDUSTRIES OF THE STATE OF ALABAMA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX.


| | Original | Print |
|---|---|---|
| Proceedings in U. S. C. C. A., Fifth Circuit | 1 | 1 |
| Caption and appearances ..... (omitted in printing) | 1 | |
| Record from D. C. U. S., Middle District of Alabama | 2 | 1 |
| Bill of complaint | 2 | 1 |
| Order setting application for preliminary injunction for hearing | 26 | 20 |
| Exhibit "A"—United States Department of Agriculture Regulations for carrying into effect the Process or Renovated Butter Act | 27 | 20 |
| Motion to dismiss complaint | 45 | 34 |
| Notice of motion to dismiss | 46 | 34 |
| Decree on motion to dismiss, etc. | 47 | 35 |
| Stipulation of facts | 48 | 36 |
| Final decree | 50 | 37 |
| Petition for appeal | 53 | 39 |
| Order allowing appeal | 53 | 39 |
| Assignment of errors | 54 | 40 |
| Designation of record | 55 | 40 |
| Cost bond ..... (omitted in printing) | 56 | |
| Clerk's certificate ..... (omitted in printing) | 58 | |
| Minute entry of argument and submission | 59 | 42 |
| Opinion of the court, Hutcheson, J. | 60 | 42 |
| Dissenting opinion, Foster, J. | 70 | 51 |
| Judgment | 72 | 52 |
| Petition for rehearing ..... (omitted in printing) | 73 | |
| Order denying petition for rehearing | 76 | 53 |
| Motion for order staying mandate | 77 | 53 |
| Order staying mandate | 78 | 54 |
| Clerk's certificate ..... (omitted in printing) | 79 | |
| Order allowing certiorari | 80 | 55 |

[fol. 1] Captions and Appearances Omitted in Printing

[fol. 2] **IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DIVISION OF THE MIDDLE DISTRICT OF ALABAMA**

No. Civ. 72

CLOVERLEAF BUTTER COMPANY, a Corporation, Plaintiff,

vs.

HAGOOD PATTERSON, as Commissioner of Agriculture & Industries of the State of Alabama, et al., Defendants

BILL OF COMPLAINT—Filed June 28, 1940

To the Hon. C. B. Kennamer, Judge of the United States District Court for the Northern Division of the Middle District of Alabama, in Equity Sitting:

Cloverleaf Butter Company, a corporation, brings this its bill of complaint and respectfully shows unto your Honor as follows:

Plaintiff

1. Cloverleaf Butter Company is a corporation organized under the laws of the State of Alabama, and has its principal place of business and office in Jefferson County, Alabama.

Defendants

2. Hagood Patterson is a citizen of the State of Alabama. He is over 21 years of age, and resides in Montgomery, Alabama. He is Commissioner of Agriculture and Industries of the State of Alabama. His office and official residence is in the City of Montgomery, Alabama.

3. George H. Marsh is a citizen of the State of Alabama, and resides in the City of Montgomery, Alabama. He is over 21 years of age. He is Director of the Division of Agricultural Chemistry in the Department of Agriculture and Industries of the State of Alabama, and has his official [fol. 3] residence and office in the City of Montgomery, Alabama.

Jurisdiction

4. This action arises under the Constitution of the United States of America, Article 1, Section 8, and Title 26, Chapter 713, United States Code Annotated, Sections 571, 572, 578, 579, 580, 582, and Title 26, Sections 990 and Section 995, Subchapter (b) of Chapter 9, and the regulations adopted pursuant thereto approved by Henry A. Wallace, Secretary of Agriculture, Wayne C. Taylor, Acting Secretary of the Treasury and Guy T. Helvering, Commissioner of Internal Revenue of the United States of America. Also Title 21, United States Code Annotated, Sections 71-93, and 103-105, inclusive, and Title 19, United States Code Annotated, Section 181. The matter in controversy exceeds, exclusive of costs, the sum of Three Thousand Dollars.

Complaint

5. About the 1st day of June, 1920, plaintiff started in the business of manufacturing renovated or process butter, as those terms are defined in Paragraph (c) of Section 990, Title 26, Subchapter B of the United States Code Annotated, under a license issued to the plaintiff by the United States of America, and since said time, plaintiff has been continually engaged in said business under a license from the United States of America, and has conformed to and complied with all of the statutes of the United States of America relating to the manufacture of process or renovated butter, and the regulations relating thereto adopted and promulgated pursuant to said statutes.

6. Plaintiff avers that in Section 995 of Chapter 9, Title 26, United States Code Annotated, it is provided:

[fol. 4] "The Secretary of Agriculture is authorized and required to cause a rigid sanitary inspection to be made at such times as he may deem proper or necessary, of all factories and storehouses where process or renovated butter is manufactured, packed or prepared for market and of the products thereof and materials going into the manufacture of the same. * * * The Secretary of Agriculture shall make all needful regulations for carrying this section and sections 996 (c) and 997 (b) into effect and shall cause to be ascertained and reported from time to time the quantity and quality of process or renovated butter manufactured, and the character and the condition of the material from

which it is made. And he shall also have the power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other states or in course of exportation or shipment he shall have power to confiscate the same."

7. Plaintiff avers that the Secretary of Agriculture has heretofore promulgated regulations relating to process or renovated butter, which were revised in April, 1936 and appear in a bulletin known as Regulations No. 9, issued by the United States Treasury Department, Bureau of Internal Revenue. Said regulations were further revised and made more specific on to-wit, the 24th day of December, 1936 by Henry A. Wallace, Secretary of Agriculture, all of which appears in a bulletin entitled "Regulations for Carrying into Effect the Process or Renovated Butter Act", and plaintiff attaches hereto a photostat copy of the aforesaid regulations for carrying into effect the Process or Renovated Butter Act, and marks the same Exhibit "A" and makes the same a part of this bill as if fully set out herein at this place.

[fol. 5] 8. Plaintiff avers that in the aforesaid regulations in Paragraph (d) of Article 130 on page 74 of Regulations No. 9, it is specifically provided:

"(d) *Deleterious products seizable.*—The Secretary of Agriculture will determine whether or not materials being used in the manufacture of process or renovated butter will be deleterious to health or unwholesome in the finished product. If any materials which have been so determined to be deleterious to health or unwholesome in the finished product are found to be present in any process or renovated butter, intended for, or in course of, exportation or shipment in interstate commerce, such process or renovated butter will be confiscated."

9. Plaintiff avers that when it started in the business of manufacturing renovated or process butter, as those terms are defined by Paragraph (c) of Section 990, Title 26, Subchapter (b) United States Code Annotated, pursuant to the aforesaid statutes of the United States and the regulations

authorized and promulgated, the Secretary of Agriculture had taken over the entire field of inspection of all factories and storehouses where process or renovated butter was manufactured, packed or prepared for market, and of the products thereof and materials going into the manufacture of the same, including the field of ascertaining and reporting from time to time the quantity and quality of process or renovated butter manufactured, and the character and condition of the material as soon as it was made, and the determination of whether or not materials used in the manufacture of process or renovated butter would be deleterious to health or unwholesome in the finished product. And plaintiff avers that the Secretary of Agriculture has occupied said field continuously and exclusively until the seizure of some raw materials, the property of the plaintiff hereinafter referred to.

[fol. 6] 10. Plaintiff avers that in the performance of the duties imposed upon him by the aforesaid statutes of the United States, and the aforesaid regulations adopted and promulgated pursuant thereto, the Secretary of Agriculture has made or caused the inspections required by law to be made from time to time by experts of the Department of Agriculture of the United States of America, both as to the raw material from which process or renovated butter is manufactured, and the finished product, as well as the storehouses and factories where process or renovated butter is manufactured, packed or prepared for market, including the plant operated by the plaintiff. Plaintiff avers that since it started in the business of manufacturing process or renovated butter on to-wit, June 1, 1920, its factories and storehouses where it manufactures, packs or prepares butter for market has been frequently inspected by the Secretary of Agriculture and that during said time the Secretary of Agriculture has made frequent inspections of all raw material which plaintiff uses in the manufacture of process or renovated butter, and he has also made frequent inspections of the finished product, and at no time has the Secretary of Agriculture ever determined that any materials used by the plaintiff in the manufacture of process or renovated butter will be deleterious to health or unwholesome in the finished product.

11. Plaintiff avers the raw material it purchases and uses in the manufacture of process or renovated butter, is com-

monly referred to as packing stock butter, and is purchased or acquired from small farmers and small producers of butter, and small country stores and rolling stores which obtain such butter from small farmers, or small producers of butter in exchange for cash, groceries or other commodities. These small farmers and small producers of butter, and small country stores and rolling stores are [fol. 7] located in the states of Georgia, North and South Carolina, Tennessee, Virginia, Mississippi and Alabama. Approximately 75% of such raw material originates without the State of Alabama and is transported to plaintiff in Birmingham, Alabama, in interstate commerce. The raw material originating in Alabama, is transported to the plaintiff in Birmingham, Alabama, in interstate commerce for the manufacture of process or renovated butter for shipment to persons, firms and corporations in interstate commerce without the State of Alabama. None of the raw materials originating within or without the State of Alabama has ever been sold, offered, exposed or kept for sale by the plaintiff in its then condition, but is acquired solely for the purpose of being manufactured into process or renovated butter, and all of said raw material enters into the stream of interstate commerce from the time it is acquired by the plaintiff until it is delivered, and remains in said stream until delivery of the finished product manufactured from said raw material is accepted by the purchaser of the said finished product.

12. Plaintiff further avers that all of the raw material used by the plaintiff in the manufacture of process or renovated butter whether originating inside or outside of the State of Alabama is delivered to plaintiff's plant in Birmingham, Alabama, in interstate commerce, and is there subjected to a process by which it is melted, clarified, pasteurized, cleansed and refined, and the butter fat drawn off or extracted, melted, clarified, pasteurized, cleansed and refined, and then mixed with pure milk or pure milk product, rechurned and manufactured into process or renovated butter to be sold in interstate commerce.

13. Plaintiff avers that the finished product it manufactures is recognized as an article of commerce by the United States of America, as well as the State of Alabama, as [fol. 8] appears in Section 71 of the Argicultural Code of the State of Alabama.

14. Plaintiff further avers that after the raw material it acquires in interstate commerce is subjected to the aforesaid process at its plant in Birmingham, Alabama, and is manufactured into the finished product, that approximately 90% of the said finished product is sold without the State of Alabama, and is transported from plaintiff's plant to destinations in states outside the State of Alabama in interstate commerce, and that approximately 10% of its finished product is offered for sale to the trade in the State of Alabama. Plaintiff further avers that the demand for the finished product exceeds the entire production possible with the available supply of raw material.

15. Plaintiff avers that it owns a modern, up-to-date plant in the City of Birmingham, which now has a value of to-wit, fifty thousand dollars, and plaintiff employs about 25 people in the daily operation of said plant, which is operated continuously unless interrupted by lack of raw material. Its factory is designated by the United States as "United States Factory No. 1, District of Alabama, Process Butter."

16. Plaintiff avers that when it started in the business of manufacturing process or renovated butter, about the 1st of June, 1920, its annual requirements of raw material amounted to approximately 100,000 pounds of packing stock butter per year, having a value of to-wit, ten thousand dollars; that its annual requirements for the manufacture of its process or renovated butter at the present time is approximately 2,000,000 pounds of packing stock butter, having a value of in excess of three hundred thousand dollars; that its business has grown and developed from the [fol. 9] aforesaid modest operation to its present magnitude under the strict supervision of the Secretary of Agriculture of the United States of America, and in conformity to the laws of the United States, and the rules and regulations relating to process or renovated butter made and promulgated thereto, and plaintiff avers that its said business is now reasonably worth in excess of two hundred thousand dollars, including the plant, physical equipment and goodwill.

17. Plaintiff avers that the demand for its finished product outside of the State of Alabama now exceeds its production possible with the available raw material.

18. Plaintiff avers that pursuant to Article 1, Section 8 of the Constitution of the United States, the Congress of the United States has entered and preempted the entire field in reference to the regulation and inspection of process of renovated butter in interstate commerce by the said Act of May 9, 1902, together with the sections of United States Code Annotated heretofore referred to codifying the same. And plaintiff further avers that the Secretary of Agriculture and the Commissioner of Internal Revenue, as authorized by said laws and pursuant thereto, have promulgated detailed regulations having the effect of laws for the control and inspection of process or renovated butter and the raw materials out of which same is made and the factories and plants connected therewith; said regulations having been promulgated from time to time and revised in 1936 and further amended in December 1936, and plaintiff avers that the United States Government has fully occupied and preempted the field of inspection, regulation and control of the manufacture of process or renovated butter in interstate commerce to the exclusion of the State of Alabama, its officers or agents or employees and such regulation occupies the entire field of inspection of the raw materials [fol. 10] going into the manufacture of process or renovated butter; the regulation and inspection of plants, machinery and equipment; and the operation thereof used in connection with the manufacture of the said butter and applies both to the raw material and the finished product and the plant. The enforcement of said Act of Congress has been committed to the Secretary of Agriculture and to the Commissioner of Internal Revenue of the United States and until within the last few months there has been no attempt on the part of the State of Alabama, its officers or agents, to invade said field or to inspect or suspend or seize any raw material used by the plaintiff in the manufacture of said process or renovated butter. The said duties imposed upon the Secretary of Agriculture and the Commissioner of Internal Revenue of the United States have been fully performed and discharged by them; and plaintiff avers that the said field has been and is now fully and exclusively occupied by the officers, agents or employees of the Secretary of Agriculture, as authorized by the Acts of the Congress of the United States since the plaintiff has been engaged in the manufacture of renovated or process butter; and the plaintiff expressly denies that anyone of

the defendants, or their officers, agents or employees, has any right, officially, or individually, or otherwise, to inspect or suspend or seize any of the said raw material held or used by plaintiff in or about the manufacture of renovated or process butter, or to interfere in any way whatsoever with the possession or transportation of said raw material or the manufacture of the finished product.

19. Plaintiff further avers that in the practical operation of its plant it is necessary to mix and store and plaintiff does mix and store the raw material which originates without the State of Alabama and is delivered to the plaintiff in Birmingham, Alabama, with raw materials which origi- [fol. 11] nates in the State of Alabama; and after said mixture takes place same is indistinguishable and all is used or placed in cold storage for use as raw material out of which said process butter is manufactured by the plaintiff. When the finished product is produced, it is impossible to determine what part of the finished product is composed of raw materials which originated without or within the State of Alabama. And plaintiff further avers that it does not manufacture a finished product for exclusive sale and delivery in interstate commerce different from its finished product which it offers for sale within the State of Alabama, but that its finished product offered for sale in the State of Alabama, and to persons, firms and corporations without the State of Alabama, is all of the same kind, and comes from the aforesaid source; though 90% of said finished product is, and for many years has been, sold without the state and 75% of the raw material has been bought without the state.

20. Plaintiff avers that it is advised and informed by counsel and believes, and upon such advice, information and belief avers that the Congress of the United States of America, by special and specific laws duly enacted, above referred to, and the resignated and duly authorized departments of the United States * * * have by * * * regulations adopted and promulgated thereunder, entered the field of the regulation and inspection of the manufacture and sale of process or renovated butter and of the raw material entering into the manufacture thereof, and the finished product and all factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market and of the products thereof and mate-

rials going into the manufacture of the same, and the field of determining whether or not materials being used in the manufacture of process or renovated butter will be deleterious to health or unwholesome in the finished product, and that notwithstanding the exclusive occupancy of the [fol. 12] said field by the United States of America through its Secretary of Agriculture and other duly authorized agents, pursuant to the aforesaid acts of Congress, and the regulations promulgated pursuant thereto, the defendant Hagood Patterson as Commissioner of Agriculture and Industries of the State of Alabama, and the defendant George H. Marsh as Director of the Division of Agricultural Chemistry in the Department of Agriculture and Industries of the State of Alabama, have construed the laws of the State of Alabama to authorize and warrant them to enter the premises of the plaintiff in Birmingham, Alabama, where it receives its said raw material or packing stock butter acquired by the plaintiff in interstate commerce for the purpose of manufacturing process or renovated butter, and to seize, suspend or otherwise deprive plaintiff of the right to use such raw material or packing stock butter, and to stop and search trucks moving in interstate commerce hauling said raw material from places without the State of Alabama to plaintiff's place of business in Birmingham, Alabama, and to seize, suspend or otherwise deprive plaintiff the right to use the said raw material or packing stock butter being so transported in interstate commerce and to authorize and warrant the defendants in stopping and searching trucks transporting the aforesaid raw material from points in Alabama to plaintiff's plant in Birmingham, Alabama, to be used in the manufacture of process or renovated butter as aforesaid, and acting under some supposed or claimed authority of the statutes of the State of Alabama enacted long after the United States law above referred to, the defendants have interfered with the plaintiff's business, have impeded the operation of plaintiff's plant and have prevented the plaintiff from using a large portion of the raw material entering into the manufacture of its finished product, and are threatening and intended to continue to do so, and have undertaken to inspect the raw material both in the plant and on the way to the plant and in the hands of small [fol. 13] merchants or producers or truck operators convey-

ing the same and attempted to suspend quantities of said raw material from time to time and prevent same from being used by the plaintiff in the manufacture of its finished product and have attempted to determine for themselves what may be used as raw material in the manufacture of said process butter and have invaded the field of interstate commerce and that portion of the field in connection with the operation of plaintiff's business which has been fully preempted and exclusively occupied by the United States Government for a long number of years and is at present so occupied by the United States Government and said defendants are threatening to continue to harrass and impede, regulate, direct and control the operation of plaintiff's said business and have attempted to inspect plaintiff's factory or storehouse where process or renovated butter is manufactured, packed and prepared for market and the products of the same and the materials going into the manufacture of said process butter over the protest and objection of plaintiff; and plaintiff avers that said conduct on the part of the said defendant has placed a great burden upon the plaintiff's business in interstate commerce, has unduly hampered and interfered with the same, has wrongfully caused the plaintiff great financial loss and a continuance of the same would result in great diminution of plaintiff's business or production of the same. And the plaintiff avers that defendant has interfered with and impeded plaintiff's business and has placed an undue burden upon plaintiff's business in interstate commerce, has wrongfully invaded a field which is now and has heretofore fully preempted, occupied exclusively by the United States Government under the said Act of Congress and the wrongful conduct of the said defendant in and about the same has been in the manner following, to-wit:

[fol. 14] (a). Between, to-wit, the 17th day of April, 1939, and the 22nd day of June, 1940, defendants on 16 separate occasions, seized in Birmingham, Alabama, a total of 20924 pounds of plaintiff's raw material or packing stock butter which originated in whole or in part in states of the United States outside of the State of Alabama and which had been so delivered to the plaintiff's plant in Birmingham, Alabama, as raw material and which was not being sold, offered or exposed for sale, or attempted for sale in its then condition but was being held by the plaintiff solely

and exclusively for the purpose of using the same as raw material out of which to manufacture process or renovated butter in the usual course of plaintiff's business. The said packing stock butter so seized was of the value in excess of Three Thousand Dollars and the plaintiff has been and is now deprived of the use of same and has been prevented from using the said raw material in the manufacture of its finished product during said period of time and the plaintiff has been subjected to great expense, inconvenience, delay in or about loss of the use of said raw material and the cost of keeping and storing the same. The dates and quantity seized on each occasion are as follows:

| | |
|---|---|
| April 17, 1939 | 241 pounds |
| April 29, 1939 | 981 pounds |
| May 13, 1939 | 1038 pounds |
| May 25, 1939 | 300 pounds |
| June 3, 1939 | 858 pounds |
| June 17, 1939 | 207 pounds |
| June 10, 1939 | 4238 pounds |
| June 21, 1939 | 3991 pounds |
| June 22, 1939 | 736 pounds |
| June 23, 1939 | 1527 pounds |
| June 23, 1939 | 407 pounds |
| June 23, 1939 | 400 pounds |
| July 29, 1939 | 2147 pounds |
| [fol. 15] October 5, 1939 | 511 pounds |
| June 22, 1940 | 1547 pounds |
| June 22, 1940 | 1795 pounds |

21. Plaintiff avers on, to-wit, the 21st day of June, 1940, in making the last seizure, above referred to, the defendants stopped a truck moving in interstate commerce from the State of Georgia to the State of Alabama transporting said raw material known as packing stock butter from the State of Georgia to the plaintiff in Birmingham, Alabama. Plaintiff avers that as a result of the seizure of said raw materials by defendants, it has been denied the use thereof; the seizure and detention of said raw material has caused great financial loss to the plaintiff in that plaintiff is required to pay the storage on the same and is denied the use of such raw materials that plaintiff sorely needs in the conduct of its business, and has caused plaintiff's plant to remain idle from time to time for the lack of sufficient

raw material to keep the same operating; that said action of the defendants demoralizes plaintiff's employees who are employed to operate said plant, and is calculated to and does interfere with the sale of its finished product in interstate commerce. Plaintiff further avers that the defendants have contacted the sources of raw material in Alabama from which plaintiff obtains raw material in Alabama to renovate and process butter to be shipped to persons, firms and corporations in various states of the United States to be shipped in interstate commerce to persons, firms and corporations in various states of the United States without the State of Alabama and have terrorized, frightened and intimidated said sources by statements to the effect that they would lose the value of their raw material if they undertook to furnish the same to plaintiff, or would be put to great trouble, annoyance, expense and inconvenience in and above obtaining compensation for the same, all in an effort to destroy plaintiff's [fol. 16] source of supply of raw material in Alabama for the manufacture of its finished product for transportation and sale in interstate commerce.

22. Plaintiff avers that the defendants will, unless enjoined and restrained by an appropriate order of this Court, continue to inspect all raw material used by the plaintiff in the manufacture of process butter, to-wit, said packing stock butter, which is not kept for sale, exposed for sale or offered for sale by the plaintiff, and defendants will continue to determine whether or not said raw material used by the plaintiff in the manufacture of process or renovated butter for sale and delivery in interstate commerce, will be deleterious to health or unwholesome in the finished product, all of which will subject the plaintiff to great expense, annoyance, and inconvenience in and about its efforts to obtain said raw material and market its finished product in interstate commerce, and which will cause plaintiff great monetary loss, resulting from shutdowns of its plant, the loss of orders and profits on orders that it now has and will obtain, and plaintiff avers that the value of its right to conduct its said business free from the wrongful restrictions, interferences and inspections, searches and seizures of defendants is in value greatly in excess of the value of Five Thousand Dollars.

23. Plaintiff is advised by counsel, informed and believes, and upon such advice, information and belief avers that all of the aforesaid seizures and detention of its aforesaid raw material on the aforesaid days and dates, the stoppage of said truck, above referred to, and all of the inspections made by the defendants, and all of the interferences with plaintiff's business by the defendants, herein complained of, have been made by the defendants as officers or agents of the State of Alabama under the alleged color [fol. 17] or pretended authority claimed by them to be in the laws of the State of Alabama, Agricultural Code of 1927, and amendments relating thereto, and that the particular articles of sections of said Agricultural Code so relied on by the defendants are Sections 37, 71, 72, 218, 219 and Section 217 as amended by an act approved September 14, 1935, entitled "An Act to Amend the Code of Laws known as the Agricultural Code of Alabama, 1927", etc., which said act is found on pages 1102, 1103, 1104 and 1105 of the printed Acts of the Legislature of Alabama held at its regular session in the year 1935. The said sections referred to being in words and figures as follows:

"37. Possession: Sale and Delivery of Prohibited Articles.—No person within this State shall manufacture for sale therein, have in possession with intent to sell, offer or expose for sale, sell, or deliver any article of food or drugs which is adulterated or misbranded within the meaning of this Article."

"71. Renovated Butter.—No person shall sell in this State any butter that is produced by taking original packing stock butter, or other butter, or both, and melting the same so that the butter fat can be drawn off or extracted, then mixing the said butter fat with skimmed milk, or milk, or cream, or other milk product, and re-churning or re-working the said mixture, or that produced by any process that is commonly known as boiled, process or renovated butter, unless the words "renovated butter" shall be plainly branded with Gothic or bold faced letters at least three-fourths of an inch in height on the top and sides of each tub, or box, or pail, or other kind of case, or package, or on the wrapper of prints or rolls in which it is put up. If such butter is exposed for sale uncovered or not in a case or package, a placard containing the labels so printed

[fol. 18] shall be attached to the mass of butter in such manner as to easily be seen and read by the purchaser. The branding or marking of all packages shall be in the English language, and in a conspicuous place so as to be easily seen and read by the purchaser."

"72. Commissioner Charged With Enforcement.—The Commissioner and his duly authorized agents shall be charged with the proper enforcement of all the provisions of this Article."

"218. Proceeding to Condemn Seized Article.—Any fertilizer, fertilizer material, ground limestone, paint, white lead, linseed oil, turpentine, kerosene or other illuminating oils, gasoline, benzine or other liquid motor fuels, insecticides and fungicides, commercial feeds, agricultural seeds, eggs, vinegar, sausage, milk, cream, ice cream or other dairy products, imitation butter and cheese, or any article of food or drug which is adulterated, misbranded or under standard, grade, weight or measure claimed within the meaning of any provision of this Code, and which is manufactured for sale, held in possession with intent to sell, offered or exposed for sale, or sold or delivered within this State, shall be liable to be proceeded against in the Circuit Court of the County where the same is found, and seized for confiscation by writ of attachment for condemnation. Such writ shall issue upon the sworn complaint of the Commissioner or his duly authorized agent, taken by an officer authorized to administer an oath to the effect that such articles or product is adulterated or misbranded or is under standard, grade, weight or measure claimed, as the case may be within the meaning of this Article. The said sworn complaint by said Commissioner or his duly authorized agent, may be amended at any stage of the proceedings. Said writ shall be returnable in five days to the Court issuing the writ; such Court shall hear and decide [fol. 19] whether the allegations of the complaint are true, and whether said article or product shall be condemned and confiscated. Such hearing shall not be had until five days' notice of the date therefor shall have been served on the owner, his agent, or any other party having an interest in the same, except in case defined in subhead (a). Service of a copy of the writ of attachment showing the returns of the attaching officer shall be sufficient notice for the purposes of this Section. Such writ may be executed

by the Commissioner, his duly authorized agent, or by any sheriff or constable in the State. Upon the seizure of the article or product described in the affidavit, it shall be the duty of the officer or person executing the writ to return same to the Circuit Court, with his return thereon, and within five days after its return, the Court shall make up an issue between the State as Plaintiff and the property seized as defendant. (a) In the event that the owner or his agent cannot be found in this State, then said service may be perfected by posting a copy of the writ in a conspicuous place upon the premises where the goods were found and seized, and by mailing a copy thereof by registered mail to the owner or his agent, to his last known address, and this shall be deemed to be sufficient service of the notice required by this Section. If upon the return day of such writ of attachment, the owner of the article or product, his agent or other party having an interest in same thus notified fails to appear and show cause why said goods should not be condemned, judgment of condemnation and confiscation shall, upon such default, be rendered by the Court on the basis of said complaint. If such owner or agent or other party having an interest in such article or product shall on or before the return day of the writ of attachment, or upon such other day as the Court upon application of such party may determine, shall file an answer upon oath denying the allegations of adulteration, misbranding, or under standard, grade, weight or measure, as the case may be, in said complaint, the issue thus raised [fol. 20] may be determined by the Court after hearing all the evidence offered by or in behalf of all the parties to the proceedings. Any such party may demand a jury trial of any issue of fact to be determined in the proceedings instituted hereunder, and in case a jury trial is demanded, the judgment rendered by the Court shall be in accordance with the facts as found by such jury; provided, however, that the verdict of the jury may be set aside by the Court where manifestly contrary to the evidence of law. If a judgment of condemnation and confiscation is rendered against such article or product as being adulterated, misbranded, or under standard, grade, weight or measure, within the meaning of this Article, the same shall be disposed of by destruction or sale, as the Court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Agricultural Fund, but such goods shall not

be sold contrary to the provisions of this Article; provided, however, that upon the payment of the costs of such attachment proceedings and the execution and delivery of a good and sufficient bond to the effect that such article shall not be sold or otherwise disposed of contrary to the provisions of this Article, the Court may be ordered direct that such article or product shall be delivered to the owner thereof."

"219. Report of Violations to Solicitor. If it shall appear from examination or analysis of fertilizer, fertilizer material, ground limestone, paint, white lead, linseed oil, turpentine, kerosene or other illuminating oils, gasoline, benzine or other liquid motor fuels, insecticides and fungicides, commercial feeds, agricultural seed, eggs, vinegar, sausage, milk, cream, ice cream or other dairy products, imitation butter and cheese, or any articles of food or drugs that any of the provisions of this Article have been violated, the Commissioner shall certify or cause to be certified the facts to the county or State solicitor, with a copy of the results of the analysis or examination, and [fol. 21] said county or State solicitor upon receipt of this information shall cause appropriate proceedings to be instituted in the proper Court, for the imposition of fines and penalties herein provided."

"Section 3. That Section 217 of Article Twenty-three of the 'Agricultural Code of Alabama', of 1927, be and the same is hereby amended so as to read as follows: Section 217. Suspension of Sale of Article.—If at any time the Commissioner or his duly authorized agent, shall have reason to believe that any product or products or article mentioned in the succeeding sections of this Article, which are held in possession, delivered, kept offered or exposed for sale in this State, do not comply with the requirements of this Article or other Article of this Code as to ingredients, substance, analysis, marking or labelling, weight or measure of the same, it shall be his duty by written order to suspend the sale of the same until he shall have satisfied himself, or shall be satisfied by an analysis, or otherwise, that such product or article is made up, compounded or marked as required by law and rules and regulations under authority of law. If he shall find that the same does not comply with such laws and rules and regulations, either before or after the making of such suspension order, then he is authorized

to proceed with regard to the same as provided in the succeeding Sections of this Article, or he may order in writing the same to be held at his disposition pending the placing of such product or article in such condition as will meet the requirements of such laws, rules and regulation, under the supervision and direction of the Commissioner or his duly authorized agent, or at the discretion of the Commissioner proceeding with regards to the same as provided in the succeeding Sections of this Article. Provided in case the owner of such product or articles denies by written notice to the [fol. 22] Commissioner or his agent that the same is not in compliance with the laws, rules or regulations and requests a hearing thereon, the Commissioner or his agent shall as soon as practicable thereafter proceed as provided in the succeeding Sections of this Article, in order that the Court may hear and decide said issue and proceed as provided for in the succeeding Sections of this Article. Any person who moves, transports, sells or in any other manner disposes of any product or article after such product has been ordered suspended or held as hereinbefore provided shall be guilty of a misdemeanor and upon conviction thereof fined not more than Five Hundred ($500.00) Dollars or imprisoned for not more than six months or both, provided that such product or article may be moved, trapported or otherwise disposed of by and in compliance with written order by the Commissioner."

Sec. 3, pp. 1103 and 1104 of the Acts of 1935.

24. Plaintiff is advised by counsel, informed and believes, and on such advice, information and belief avers that neither the aforesaid statutes or any other valid statute of the State of Alabama authorizes or justifies, when properly construed, the action of the defendants herein complained of, or interference with the plaintiff's business, herein complained of, or their attempt to determine whether or not material used by the plaintiff in the manufacture of process or renovated butter will be deleterious to health or unwholesome in the finished product, or their seizure on said occasions of said raw material above described and referred to.

25. Plaintiff is advised by counsel informed and believes, and on such information and belief, avers that each of the acts of the defendant, herein complained of, and their at-

tempt to determine whether or not the raw material used [fol. 23] by the plaintiff in the manufacture of process or renovated butter will be deleterious to health or unwholesome in the finished product, as well as their seizure of said raw material on the days and dates above referred to, as well as their contemplated future seizure of raw material so to be used by the plaintiff, is wholly outside of and beyond and without the statutes of the State of Alabama when properly construed, inasmuch as the Congress of the United States has entered and preempted the field of determining whether or not material used in the manufactured of process or renovated butter will be deleterious to health or unwholesome in the finished product, as well as the field of making a rigid sanitary inspection at such times as the Secretary of Agriculture may deem proper or necessary of all factories and warehouses where process or renovated butter is manufactured, packed or prepared for market, and of the products thereof and material going into the manufacture of the same.

Premises considered, the plaintiff prays that Hagood Patterson, as Commissioner of Agriculture and Industries of the State of Alabama, in his official capacity as such officer, and George H. Marsh, as Director of the Division of Agricultural Chemistry in the Department of Agriculture and Industries of the State of Alabama, in his official capacity as such official, each be made parties defendant to this bill of complaint by appropriate legal process; that this Court will order said defendants to appear before it on such day and date as the Court may fix, and at said time after a hearing as prescribed by law, issue a preliminary injunction to the said Hagood Patterson, as Commissioner of Agriculture and Industries of the State of Alabama, and the said George H. Marsh, as Director of the Division of Agricultural Chemistry in the Department of Agriculture and In- [fol. 24] dustries of the State of Alabama, enjoining and restraining them and each of them and their officers, agents and employees, from:

(1) Determining or attempting to determine whether or not raw material known as packing stock butter, used by the plaintiff in the manufacture of process or renovated butter will be deleterious to health or unwholesome in the finished product, and determine or attempting to determine whether or not packing stock butter in plaintiff's possession

to be used exclusively in the manufacture of process or renovated butter will be deleterious to health or unwholesome in the finished product.

(2) Inspecting packing stock butter or any other raw material used in the manufacture of process or renovated butter in plaintiff's possession or under its control which is not held by the plaintiff for sale, offered for sale or exposed for sale in its then condition.

(3) Inspecting plaintiff's factory and storehouse where process or renovated butter is manufactured, packed or prepared for market, or the products thereof or the materials going into the manufacture of the same.

(4) Seizing or attempting to seize, defaining or attempting to detain, suspending or attempting to suspend, or otherwise interfering with the transportation, storage, possession, purchase or use of packing stock butter used by the plaintiff in the manufacture of process or renovated butter, or in its possession or under its control for such purpose exclusively.

(5) Seizing or attempting to seize, or otherwise interfere with plaintiff's plant or any truck or other vehicle operated by the plaintiff for the transportation or storage [fol. 25] of packing stock butter in plaintiff's possession, or under its control to be used exclusively in the manufacture of process or renovated butter.

(6) Seizing or searching, or attempting to seize or search, inspecting or attempting to inspect, detaining or attempting to detain, or otherwise interfering with any packing stock butter, the property of the plaintiff, held by it for the exclusive purpose of manufacturing process of renovated butter, which is kept in any warehouse, cold storage refrigerator place, or other place of business by direction of or under arrangements with the plaintiff.

(7) Informing, suggesting, insinuating, or otherwise undertaking to create in the mind of producers of packing stock butter, the impression that they will have difficulty in obtaining compensation for any packing stock butter sold plaintiff, or attempting to create the impression in the minds of such persons that the plaintiff's business is improperly or illegally conducted.

And plaintiff prays that upon final hearing said preliminary injunction be made perpetual, and plaintiff submits

itself of the jurisdiction of the Court, offers to do equity, and if it has not prayed for the proper relief, it now prays for such other, further, general, special or appropriate relief as in equity it may be entitled to, for which it will as in duty bound ever pray.

Horace C. Wilkinson, Erle Pettus, Victor H. Smith, Attorneys for Plaintiff.

[fol. 26] *Duly sworn to by James M. Kidd. Jurat omitted in printing.*

---

IN UNITED STATES DISTRICT COURT

ORDER FOR HEARING—Filed June 28, 1940

On Presentation and Consideration of the foregoing verified bill of complaint, it is Ordered that proper process in the manner and form prescribed by law issue to each of the defendants named in the foregoing bill of complaint; it is further Ordered that the application for preliminary injunction prayed for in the bill of complaint be and the same is hereby set for hearing before the undersigned in Montgomery, Alabama, on the 12th day of July, 1940, at 10 A. M. o'clock, in the United States District Court Room in said City. It is further Ordered that a copy of this order, together with a copy of the bill of complaint be served instanter upon each of the defendants and due return made according to law.

[fol. 27] Done and Ordered at Montgomery, Alabama, on this the 28th day of June, 1940.

C. B. Kennamer, Judge, United States District Court, Northern Division of the Middle District of Alabama.

---

EXHIBIT "A" TO BILL OF COMPLAINT

B. D. I. Order No. 1—Revised. Issued December 24, 1936.

United States Department of Agriculture,
Bureau of Dairy Industry.

Regulations for Carrying Into Effect the Process or Renovated Butter Act.

Introduction

Under authority conferred upon the Secretary of Agriculture by the act of Congress approved May 9, 1902, en-

titled "An act to make oleomargarine and other imitation dairy products subject to the laws of any State, or Territory, or the District of Columbia, into which they are transported, and to change the tax on oleomargarine, and to impose a tax, provide for the inspection, and regulate the manufacture and sale of certain dairy products, and to amend an act entitled 'An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine approved August 2, 1886'" (32 Stat. 193-197; U. S. C., title 26, sec. 990-997); and by the act of Congress approved August 10, 1912, en- [fol. 28] titled "An act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1913" (37 Stat. 273); the following regulations are made and are hereby promulgated, which for purposes of identification are designated B. D. I. Order No. 1—Revised, superseding S. R. A. 1—Bureau Dairying, issued April 1925; and B. D. Order 1, issued February 14, 1925; which are hereby revoked.

Henry A. Wallace, Secretary of Agriculture.

Washington, D. C., December 24, 1936.

## Regulation 1.—Short Title of Act

For the purpose of these regulations the act entitled "An act to make oleomargarine and other imitation dairy products subject to the laws of any State or Territory or the District of Columbia into which they are transported, and to change the tax on oleomargarine and to impose a tax, provide for the inspection, and regulate the manufacture and sale of certain dairy products, and to amend an act entitled 'An Act Defining Butter', also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine approved August 2, 1886", approved May 9, 1902 (32 Stat. 193-199; U. S. C., title 26, sec. 990-997, as amended by the act of August 10, 1912 (37 Stat. 273, U. S. C., title 26, sec. 997 (c) ), entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1913", shall be known and referred to as the Process or Renovated Butter Act. The Chief of the Bureau of Dairy Industry is charged, under the direction of the Secretary, with the administration of these regulations.

[fol. 29] Regulation 2.—Definitions

For the purpose of these regulations the following words, phrases, names, and terms shall be construed, respectively, to mean:

Section 1. The Meat Inspection Act.—The act of June 30, 1906, entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, nineteen hundred and seven" (34 Stat. 674-679) as re-enacted by act of March 4, 1907 (34 Stat. 1260-1265; U. S. C., title 21, secs. 71 to 94), entitled "An act making appropriations for t' Department of Agriculture for the fiscal year ending June thirtieth, nineteen hundred and eight", the sanitary provisions of which are made applicable to renovated-butter factories by act of Aug. 10, 1912 (37 State. 273; U. S. C., titles 26, sec. 997 (c) ), entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1913."

Sec. 2. Department.—The United States Department of Agriculture.

Sec. 3. Bureau.—The Bureau of Dairy Industry of the United States Department of Agriculture.

Sec. 4. Chief of Bureau.—The administrative head of the Bureau of Dairy Industry of the United States Department of Agriculture.

Sec. 5. Inspector.—Any Department officer or employee authorized to perform any duties in connection with the administration of these regulations.

Sec. 6. Person.—Natural persons, individuals, firms, partnerships, corporations, companies, societies, and associa-[fol. 30] tions, and agent, broker, officer, employee, or member thereof. This term shall import both the plural and the singular as the case may be.

Sec. 7. Butter.—The food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter.

Sec. 8. Par. 1. Process or renovated butter.—Butter which has been subjected to any process by which it is melted, clarified, or refined and made to resemble genuine butter, always excepting adulterated butter as defined in section 4 of the act of May 9, 1902 (32 Stat. 195).

Par. 2. Process or renovated butter must contain at least 80 per cent by weight of milk fat.

Par. 3. The term "process butter" and "renovated butter" are used synonymously and it is immaterial whether a manufacturer designates the product "process butter" or "renovated butter."

## Regulation 3.—Sanitation and Sanitary Inspection of Process or Renovated Butter Factories

Section 1. For the purpose of effectively administering the Process or Renovated Butter Act, rigid sanitary inspections will be made at such times and as often as necessary of all process or renovated butter factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market.

Sec. 2. Inspectors shall have access at all times by day or night to every part of any process or renovated butter factory or storehouse.

[fol. 31] Sec. 3. Process or renovated butter factories or storehouses where process or renovated butter is manufactured, packed, prepared, or handled shall be maintained in a sanitary condition, and to this end the requirements of sections 4 to 12 of this regulation shall be complied with.

Sec. 4. Factories where process or renovated butter is manufactured, packed, or prepared for market shall be suitably lighted, screened, and ventilated in order that sanitary conditions may be maintained. Such factories shall be supplied with proper and sufficient drainage, having proper traps or other approved sewer connections. Rooms shall be kept reasonably free from steam and other vapors by heating or proper ventilation, and all work in such factories shall be performed in a sanitary manner.

Sec. 5. All floors, ceilings, walls, pillars, partitions, platforms, stairways, etc., shall be kept in a sanitary condition and when necessary shall be scraped, washed, painted, or otherwise treated as required. Where floors or other parts of the building, or tables or other parts of the equipment, are so old or in such poor condition that they cannot readily be made sanitary, they shall be removed and replaced with suitable material. Walks, platforms, and approaches leading into factories shall be kept clean.

Sec. 6. All churns, melting tanks, workers, cans, vats, blowing tanks, settling tanks, trucks, trays and other receptables, chutes, platforms, racks, tables, and all utensils, machinery, and other equipment used in preparing, moving, cutting, chopping, and otherwise handling the materials used in the manufacture of process or renovated butter, and in all processes of manufacturing of process or renovated butter or its preparation for market, shall be kept in a sanitary condition.

[fol. 32] Sec. 7. All factories in which milk, cream, or mixtures containing milk or cream are pumped or conducted through pipes shall be equipped with sanitary pumps, pipes, and fittings. Pumps shall be so constructed that all parts coming in contact with milk, cream, or mixtures containing milk or cream shall be made of non-corrosive metal, or shall be suitably nickeled, tinned, or coated with other approved metal, and such part shall be accessible for cleaning. Pipes shall have smooth outer and inner surfaces coated with nickel, tin, or other approved metal, and fittings shall have smooth outer and inner surfaces coated with nickel, tin, or other approved metal, and shall be of such design that no pockets or recesses occur on the inside between the pipes and fittings: Provided, however, That open conductors having smooth outer and inner surfaces coated with nickel, tin, or other approved metal may be used in place of pipe. All pumps, pipes, fittings, and conductors shall be kept in a sanitary condition.

Sec. 8. Managers of process or renovated butter factories shall require employees to be cleanly. Aprons, smocks, and other outer clothing worn by employees who handle or in any way come in contact with the process or renovated butter or any ingredient entering into the manufacture of same shall be of material that can be made sanitary by washing, and only clean garments shall be worn. All persons who handle process or renovated butter or any material entering into the manufacture of same shall be required to keep their hands clean, and they shall be required also to pay particular attention to the cleanliness of their boots and shoes.

Sec. 9. No person affected with tuberculosis or other communicable disease shall be employed in any factory where process or renovated butter is manufactured, and any em- [fol. 33] ployees who may be suspected of being so affected

shall be reported by the inspector to the manager of the factory and to the Chief of Bureau.

Sec. 10. All water closets, toilet rooms, and dressing rooms shall be entirely separated from the compartments in which process or renovated butter is manufactured, prepared, packed, stored, or otherwise handled; and where such rooms open into compartments in which process or renovated butter is handled they shall be provided with properly ventilated vestibules and automatically closing doors. They shall be conveniently located, sufficient in number, ample in size, and fitted with modern lavatory accommodations, including toilet paper, soap, running hot and cold water, etc., and shall be properly lighted, suitably ventilated, and kept clean and sanitary.

Sec. 11. The factory in which process or renovated butter is manufactured, prepared, packed, stored, or otherwise handled shall be kept free from odors coming from poultry rooms, egg rooms, toilet rooms, catch basins, or any other objectionable source, and shall be kept free from flies and other vermin; and all rooms or compartments shall be provided with cuspidors so designed as to prevent them from being upset, and made of such material and construction as to be readily disinfected, and employees who expectorate shall be required to use them.

Regulation 4.—Sanitation and Sanitary Inspection of Products of and Material From Which Process or Renovated Butter is Manufactured.

Section 1. Rigid sanitary inspections will also be made of the character and condition of the materials going into the manufacture of process or renovated butter and of the quantity and quality of process or renovated butter manufactured.

[fol. 34] Sec. 2. Due care must be taken to prevent process or renovated butter, in any stage of its manufacture, from falling on the floor, and in the event of its having so fallen, the soiled portion shall not be used. Butterfat collected from floors, drains, or catch basins shall not be used in the manufacture of process or renovated butter.

Sec. 3. Only good, clean, and wholesome water and ice shall be used in the preparation and manufacture of process or renovated butter and, whenever there is any doubt re-

garding the purity of the water supply, the facts shall be reported to the Chief of Bureau.

Sec. 4. Air used in blowing or aerating the oil during the process of manufacture shall be pure and clean, and shall be taken from the outside of the building; and in order to prevent the use of air which is contaminated with dust, smoke, objectionable odors, etc., some approved method of purification, such as washing or filtering through cotton, shall be provided.

Sec. 5. In manufacturing process or renovated butter all cream, milk or skim milk used must be pasteurized.

Sec. 6. All milk, skim milk, dried milk, dried skim milk, cream, and analogous substances used in the making of process or renovated butter shall be kept, stored, and handled in a sanitary manner in accordance with accepted dairy practices.

Sec. 7. All other materials including salt and butter color entering into the manufacture of process or renovated butter shall also be kept, stored, and handled in a sanitary manner.

[fol. 35] Sec. 8. All cartons, parchment wrappers, liners, packages, tubs, cans, tins, or other containers used for packaging process or renovated butter shall be stored, kept, and handled in a sanitary manner.

Regulation 5.—The Marking, Labeling and Branding of Process or Renovated Butter.

Section 1. (a) Before removal from the factory each package of process or renovated butter shall have legibly printed or stenciled on one of its sides the legend "Process Butter" or "Renovated Butter"; also the factory number, district, and State, and the net weight, in the following manner:

Process Butter

Factory No. 2, 2d Dist. New York

Net Weight, 60 lbs.

(b) The legend "Process Butter" or "Renovated Butter" shall be in bold-face gothic letters not less than three-quarters of an inch and the other words and figures not less than half an inch square. The color of the legend shall be in strong contrast to that of the package.

Sec. 2. The wrappers, cartons, or other containers in which prints or rolls are placed shall be branded with the legend "Process Butter" or "Renovated Butter" in boldface gothic letters, not less than three-eighths of an inch square. Such legend shall form a strong contrast to the color of the wrapper or container. No other marks shall be made on the side of the wrapper or container on which the legend is placed.

Sec. 3. Each package must show the manufacturer's name and address or the factory number, district, and State, and [fol. 36] bear a plain and conspicuous statement of the net weight of contents. Such wrappers, cartons, or other containers shall bear no pictorial or other representation which may create the impression that the article is butter as defined by the act of Congress of March 4, 1923.

Sec. 4. The top surface of solid-packed goods shall be imprinted with the legend "Process Butter" or "Renovated Butter" in plain gothic letters not less than half an inch square, and impressed at least an eighth of an inch deep. Prints and rolls shall be similarly impressed with letters not less than three-eighths of an inch square. The surface impression may be omitted from prints and rolls of less than a pound unit weight, provided there is compliance with all other requirements.

Sec. 5. With the exception of shipping marks, any marks, brands, or labels, other than those prescribed by these regulations, shall be approved by the Secretary of Agriculture before they are used on packages of process or renovated butter.

Sec. 6. Approved copies of all marks, brands, or labels shall be retained at the manufacturer's registered place of business, available for inspection by an inspector.

Sec. 7. Every manufacturer of process or renovated butter who fails to brand the product and the containers in which it is packed is punishable by a fine of not less than $50 nor more than $500 or by imprisonment for not less than 1 month nor more than 6 months, or both. Every person who removes any such brands from any packages of process or renovated butter is punishable by a fine not exceeding $1,000 or imprisonment not exceeding 1 year, or both, as provided in section 4, act of March 3, 1891, made applicable by section 5, act of May 9, 1902.

[fol. 37] Sec. 8. Misbranding any article of food intended for interstate commerce, or manufactured or offered for sale in any Territory of the United States or the District of Columbia, is prohibited. That for the purposes of the Food and Drugs Act an article shall also be deemed to be misbranded in the case of food—

(1) If it be an imitation of, or offered for sale under the distinctive name of, another article;

(2) If it be labeled or branded so as to deceive or mislead the purchaser, or purports to be a foreign product when not so, or if the contents of the package, as originally put up, shall have been removed in whole or in part and other contents shall have been placed in such package;

(3) If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count; or

(4) If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular.

No provision of these regulations shall be construed so as to relieve any person from compliance with the Federal Food and Drugs Act.

Sec. 9. Inspectors of the Department of Agriculture, appointed for the purpose by the Secretary of Agriculture, are authorized to enter all factories and storehouses where [fol. 38] process or renovated butter is manufactured, packed, or prepared for market for the purpose of examination or inspection authorized by this act.

Sec. 10. Periodic inspection of each factory shall be made by such inspectors who will submit a complete report to the Chief of Bureau on the sanitation of the premises, the character and condition of the materials used, and the quantity and quality of process or renovated butter produced. The sanitary provisions of the Meat Inspection Act shall apply to the sanitary inspection of process or renovated butter factories. (See act of Aug. 10, 1912 (37 Stat., 273).)

Sec. 11. Process or renovated butter containing any filthy, decomposed, or putrid animal or vegetable substance shall be deemed adulterated under the Food and Drugs Act.

Sec. 12. The Secretary of Agriculture will determine whether or not materials being used in the manufacture of process or renovated butter will be deleterious to health or unwholesome in the finished product. If any materials which have been so determined to be deleterious to health or unwholesome in the finished product are found to be present in any process or renovated butter, intended for, or in course of, exportation or shipment in interstate commerce, such process or renovated butter will be confiscated, as provided for in regulation 7, section 4 hereof.

Sec. 13. Original packages of process or renovated butter for export shall be stamped and branded as in the case of packages for domestic use and may be covered with cloth, jute, or burlap. The outer covering shall be conspicuously stenciled with the legend "Process Butter" or "Renovated Butter", in boldface gothic letters not less than an inch {fol. 39} square, and the words "For Export Only" on the line beneath, in similar letters not less than three-eighths of an inch square.

Sec. 14. Process or renovated butter for export shall be examined by inspectors of the Department of Agriculture, who will issue a certificate as to its purity, quality, and grade and the sufficiency of the stamps and brands. If inspection is not made before the outer coverings are placed upon the packages, the exporter may be required to remove them.

(The foregoing secs. 1 to 14, have been promulgated by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury and the Secretary of Agriculture.)

Sec. 15. All marks, brands, or labels, within the meaning of these regulations shall include printed, lithographed, or embossed labels, stickers, seals, wrappers, and receptacles.

Sec. 16. Marks, brands, or labels to be affixed to process of renovated butter intended for export shall in all cases be printed in the English language, but they may also be literally translated into foreign languages.

Sec. 17. No mark, brand, stencil, sticker, label, or seal to be affixed to any tin, carton, wrapper, or other container in which process or renovated butter is placed shall be

used until it is approved in its final form by the Chief of Bureau. Triplicates of new trade labels in the form of sketches, proofs, or photographic copies shall be transmitted direct or through inspectors to the Chief of Bureau for approval, and finished trade labels, cartons, or wrappers shall not be prepared in advance of such approval of sketches. After such labels, cartons, or wrappers have [fol. 40] been printed, lithographed, or embossed in accordance with the approved sketches or proofs three each of such cartons, labels or wrappers shall be submitted direct or through the inspectors for final approval and filing. Copies of approved labels, cartons, or wrappers shall be kept on file and available for examination by inspectors upon request.

Sec. 18. Trade labels which bear any false or deceptive names shall not be used.

Regulation 6.—Reports

Section 1. Each process or renovated butter factory shall furnish to authorized inspectors accurate information as to all matters required in making their reports.

Regulation 7.—Process or Renovated Butter Intended for or in Course of Interstate Commerce or for Export

Section 1. To determine whether or not materials used in the manufacture of process or renovated butter are deleterious to health or unwholesome in the finished product, a sample of such butter shall be taken.

Sec. 2. Such sample shall be drawn in the following manner: A sample will be taken from every package of each lot. However, (A) if a lot includes two or more packages from one churning, a sample may be taken from one package only; or (B) if the separate churnings are not indicated, not less than one sample from each 10 tubs may be taken. Additional samples may be taken if, in the opinion of the inspector, such action is necessary to obtain representative samples of such butter.

[fol. 41] Sec. 3. The samples thus obtained, properly identified, shall be promptly forwarded to the Department for examination and chemical analysis.

Sec. 4. If such butter is found upon such examination and such chemical analysis to be deleterious to health or un-

wholesome, and such butter is intended for exportation or shipment into other States, or is in the course of exportation, or in the course of such shipment, the Secretary shall confiscate the same to prevent its use for food purposes. The Secretary may release such butter to its owner for industrial use, upon such conditions as he deems necessary to prevent its use for food purposes.

Sec. 5. Any butter suspected of being process or renovated, or adulterated, wherever found will be sampled as herein provided. The samples thus obtained, properly identified, shall be promptly forwarded to the Department for examination and chemical analysis, together with a statement outlining the circumstances of the collection of sample.

Sec. 6. All process or renovated butter intended for exportation or in the course of exportation must be marked as provided in these regulations.

Sec. 7. All process or renovated butter consigned to a foreign country must be inspected and duly certified before delivery to any vessel, carrier, or transportation company. Officers and agents of vessels and of transportation companies transporting merchandise consigned to foreign countries shall not accept process or renovated butter for transportation and export unless accompanied by an official inspection certificate issued pursuant to these regulations, properly dated and countersigned by an inspector. No vessel having on board any process or renovated butter for [fol. 42] exportation from any port of the United States will be cleared until the owner or shipper shall obtain an inspection certificate as required by these regulations, attesting to the purity, legal composition, and suitability for export of such process of renovated butter.

Sec. 8. Owners or shippers of process or renovated butter intended for export shall apply for inspection in writing to the Chief of Bureau. The said application shall state the location or place of business of the owner or shipper and the usual place or places where the process or renovated butter may be inspected, the place or places from which it is directly transported to the exporting vessel or transportation company, and the probable frequency of exports.

Sec. 9. The Chief of Bureau shall, upon receipt of such application, designate an inspector for the service required.

Sec. 10. The owner or shipper will notify the inspector of every export shipment to be made by him, at least 12 hours in advance, and shall briefly describe the location, form of package, and quantity of process or renovated butter to be inspected. The inspector will not be required to make inspections at two or more places distantly removed from one another if the materials are to be included in one shipment, but the inspection of an entire shipment may be made at the pier or place of loading for export.

Sec. 11. Inspections of process or renovated butter for export may be made at the place of manufacture and such inspections may also be made at the place of exportation, if inspection has not previously been made, or, in the opinion of the inspector, a reinspection is necessary. The [fol. 43] certificate for export will ordinarily be given by the inspector at the factory or at the place where the customs papers for export are prepared.

Sec. 12. The inspector will examine the merchandise specified with the least possible delay. And it will be the duty of inspectors to examine any process or renovated butter for export, upon the application, formal or informal, of transportation companies or their agents, or any such process or renovated butter about to be loaded for export, whether or not notice thereof has been received.

Sec. 13. Inspectors may make such examination of the process or renovated butter for export in such detail as in their judgment is deemed necessary to show that such butter complies with the law and the regulations. They may take samples of the same and detain the shipment, if deemed necessary, until chemical tests of samples are made. The presence, intact and properly affixed thereon, of the stamps, marks, and labels on a lot of process or renovated butter offered for export from a registered factory or factories may be accepted by an inspector as evidence of purity and of manufacture in accordance with law and these regulations, and the prescribed export certificate may then be executed by the inspector. Additional marks or labels may, however, be required by the inspector for the more complete identification of the process or renovated butter to be exported.

Sec. 14. The inspector shall complete, countersign, and issue a certificate of export. Such certificate shall be dated,

shall show the names of the exporter and consignee, and shall describe the lot of process or renovated butter to which it applies. Such description shall include the State, revenue district, and factory number of every factory represented in the lot, and the number of packages from each [fol. 44] factory, their respective weights and the shipping marks. Such certificate shall state the process or renovated butter in question is the product of a registered factory, of legal composition, and suitable for export. Certificates shall be numbered serially and rendered in triplicate.

Sec. 15. Only one certificate shall be issued for each consignment unless otherwise directed by the Chief of Bureau.

Sec. 16. The original certificate shall be delivered to the shipper and shall be used only for the purpose of effecting the transportation and delivery of the consignment.

Sec. 17. The duplicate of the certificate shall be delivered to the shipper and by him to the agent of the railroad or other carrier which transports the consignment from the United States otherwise than by water, or to the chief officer of the vessel on which the export shipment is made and without which no clearance shall be given to any vessel having aboard any process or renovated butter and shall be used only by these agencies and for the purpose of effecting the transportation of the consignment certified. The chief officer of the vessel shall file such duplicate with the customs officer at the time of filing the master's manifest or the supplemental manifest.

Sec. 18. The triplicate of the certificate shall be retained by the inspector issuing the same.

Sec. 19. Under no circumstances shall the original or the triplicate of any certificate be used for the purpose for which it is prescribed by paragraph 17 hereof that the duplicate shall be used.

[fol. 45] Sec. 20. No person operating any steam or sailing vessel, and no railroad or other carrier, shall receive for transportation to any foreign country any process or renovated butter, except ship stores and small quantities exclusively for the personal use of the consignee and not for sale or distribution, unless and until a certificate of inspec-

tion covering the same has been issued and delivered as provided in these regulations.

Sec. 21. All special requirements, if any, of foreign countries in regard to export certificates for process or renovated butter shall be complied with in respect to all certificates issued, provided such requirements are not in violation of the laws of this country or the rules and regulations promulgated under such laws.

---

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS COMPLAINT—Filed July 12, 1940

The defendants, separately and severally, move the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against the defendants upon which relief can be granted.

2. To dismiss the action on the ground that the Court lacks jurisdiction because there is no diversity of citizenship and because no substantial Federal question is presented thereby.

3. To dismiss the action on the ground that at least five days' notice of the hearing on application for interlocutory [fol. 46] injunction has not been given to the Governor of the State of Alabama and to the Attorney General of the State of Alabama, as is provided by Section 266 of the Judicial Code, as amended, (U. S. C. A. Title 28, Section 380).

Thos. S. Lawson, Attorney General; C. L. Rowe, Assistant Attorney General, Attorneys for the Defendants. Address: State Capitol, Montgomery, Ala.

---

IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION TO DISMISS—Filed July 12, 1940

To Horace C. Wilkinson, one of the Attorneys for the Plaintiff:

Please take notice that the undersigned will bring the above motion on for hearing before this Court at the United

States Court House in the City and County of Montgomery on the 12th day of July, 1940, at 10 o'clock A. M.

C. L. Rowe, Assistant Attorney General, of Counsel for the Defendants; Address: State Capitol, Montgomery, Alabama.

---

[fol. 47] IN UNITED STATES DISTRICT COURT

DECREE ON MOTION TO DISMISS—Filed July 18, 1940

This cause coming on to be heard was submitted for decree upon the motion of the defendants to dismiss the action, and same being heard, understood and considered by the Court, the Court is of the opinion that the motion to dismiss should be overruled.

It is therefore Ordered, Adjudged and Decreed by the Court that the motion of the defendants to dismiss the action on the grounds stated in the motion be, and the same is hereby, overruled.

And this cause coming on to be further heard, was submitted for decree upon the motion of the plaintiff to strike certain language in the answer, set out in the motion on file, and same being heard, understood, and considered by the Court, the Court is of the opinion that the motion of the plaintiff to strike certain language in the answer should be overruled.

It is therefore Ordered, Adjudged and Decreed by the Court that the motion filed by the plaintiff to strike certain language of the answer in a number of the paragraphs of the answer, be, and the same, and each ground thereof, is overruled and denied.

The defendant is allowed an exception to the ruling of the Court overruling and denying the defendant's motion to dismiss the Bill.

The plaintiff is allowed an exception to the ruling of the Court in overruling and denying plaintiff's motion to strike certain language of the answer filed by the defendant.

[fol. 48] This cause will be further heard on the bill of complaint, the answer, and the proof submitted, on Thursday, July 25th, 1940, at ten o'clock A. M., daylight savings time, in the United States District Court Room, at Montgomery, Alabama.

This 18th day of July, 1940.

C. B. Kennamer, United States District Judge.

## In United States District Court

### Stipulation of Facts—Filed July 23, 1940

The parties to this cause stipulate and agree that the legal questions in dispute between the parties are:

1. Has Congress, by the enactments relating to renovated or process butter, pre-empted the field of inspection and regulation of the raw material, in interstate commerce, out of which such renovated or process butter is manufactured by the plaintiff as alleged in the bill, to the exclusion of the power of the State, its officers or agents to inspect and regulate the quality of such raw material?

2. Does the inspection of packing stock butter, in interstate commerce, used by the plaintiff in the manufacture of process or renovated butter as alleged in the bill of complaint, made or directed to be made by the Secretary of Agriculture of the United States, pursuant to the Federal laws and regulations relating to renovated or process butter, have the effect in connection with said [fol. 49] Federal laws of excluding the State of Alabama, its officers and agents, from inspecting or seizing or suspending the packing stock butter, in interstate commerce out of which renovated butter to be sold in interstate commerce as alleged in the complaint is manufactured by the plaintiff as alleged in the complaint?

3. Under the Federal statutes, is the Secretary of Agriculture of the United States the sole judge, to the exclusion of State officers and agents, of the fitness and suitability of packing stock butter, in interstate commerce as alleged in the bill, for use by the plaintiff as raw material in the manufacture of renovated or process butter for sale in interstate commerce as alleged in the bill?

4. It is further stipulated and agreed that there is no conflict in the standards of the State of Alabama and the Federal Government, relating to the fitness or suitability of packing stock butter in interstate commerce to be used as raw material in the manufacture of renovated or process butter, and that this case be confined to the legal questions set out in paragraphs 1, 2, and 3, above.

5. It is agreed that the phrase "in interstate commerce" as used in this stipulation, shall be construed to mean

"procured, transported, handled, or sold as alleged in the complaint", as the context may indicate.

This July 23, 1940.

Horace C. Wilkinson, Erle Pet[illegible], Victor H. Smith, Attorneys for Plaintiff. Thos. S. Lawson, Attorney General; C. L. Rowe, Assistant Attorney General, Attorneys for Defendants.

---

[fol. 50] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Civil Action No. 72

CLOVERLEAF BUTTER COMPANY, a Corporation, Plaintiff,

vs.

HAYGOOD PATTERSON, as Commissioner of Agriculture and Industries of the State of Alabama, et al., Defendants

DECREE—Filed July 23, 1940

On the 18th day of July, 1940, this Court after a hearing, made an order overruling the motion of the defendants to dismiss the action and set the case for further hearing at a later date.

The Court has been requested to reconsider its ruling. The defendant insist that the decree of July 18, 1940, overruling their motion to dismiss the action, was laid in error and that said decree should now be vacated and a decree rendered granting their motion to dismiss the action.

On further consideration, the Court is of the opinion that Congress has entered the field of inspecting and regulating the packing stock butter in interstate commerce, used by the plaintiff in the manufacture of process or renovated butter sold in interstate commerce in connection with the enforcement of the internal revenue laws.

The plaintiff contends Congress has pre-empted said field to the exclusion of the power of the State of Alabama. The defendants contend otherwise. The parties have entered into a written stipulation, and it is apparent the chief difference between the parties is whether Congress has pre-

empted the field of inspecting and regulating packing stock [fol. 51] butter in interstate commerce, to the exclusion of the power of the State of Alabama.

The Court is of the opinion that Congress has not attempted to pre-empt said field to the extent of excluding the State of Alabama from inspecting the raw material known as packing stock butter in interstate commerce, used by the plaintiff in manufacturing process or renovated butter in Alabama, to be sold in interstate commerce.

The Court is of the opinion that the State of Alabama, through its duly authorized officers, may inspect the raw material known as packing stock butter, even though said raw material is in interstate commerce and is used by the plaintiff in the manufacture of process or renovated butter to be sold in interstate commerce; and if, on inspection, said packing stock butter violates any law of the State of Alabama, the same may be seized by the State of Alabama and suspended or otherwise disposed of as is provided by the laws of said State.

The Court is therefore of the opinion that the decree dated the 18th day of July, 1940, be vacated; that the motion of the defendants to dismiss the action should be granted and the action should be dismissed. In conformity with that opinion the following decree will be enrolled:

This cause coming on to be heard was submitted for decree upon the motion of the defendants to vacate and set aside the decree made and entered in this cause on, to-wit, the 18th day of July, 1940, overruling the motion of the defendants to dismiss the action, and the same being heard, understood and considered by the Court, the Court is of the opinion that said motion be granted.

[fol. 52] It is therefore Ordered, Adjudged and Decreed by the Court that the decree of this Court, made and entered on the 18th day of July, 1940, overruling the motion of the defendants to dismiss the action, be and the same is hereby vacated and set aside and held for naught.

And this cause coming on to be further heard was submitted for decree upon the motion of the defendants to dismiss the action, and upon the stipulation of the parties in writing and on file, and on consideration of the same the Court is of the opinion that the motion of the defendants to dismiss the action, on the first and second grounds stated in the said motion, should be granted and the plaintiff declining to plead further;

It is therefore Ordered, Adjudged and Decreed by the Court that the motion of the defendants to dismiss the action on the aforesaid first and second grounds stated in the motion, be and the same is hereby granted and that the action be and the same is hereby dismissed.

Plaintiff is allowed an exception to the ruling of the Court in granting the motion of the defendants to dismiss the action, and to the ruling of the Court in dismissing the action.

It is further Ordered, Adjudged and Decreed by the Court that the defendants have and recover of the plaintiff their costs in this behalf expended, for which let execution issue as provided by law in such cases.

This, the 23rd day of July, 1940.

C. B. Kennamer, United States District Judge.

---

[fol. 53] In the District Court of the United States for the Middle District of Alabama, Northern Division

[Title omitted]

Petition for Appeal—Filed July 23, 1940

To the Honorable C. B. Kennamer, Judge of the United States District Court, Northern Division of Middle District of Alabama:

Cloverleaf Butter Company, your Petitioner, who is Plaintiff in the above entitled cause, prays that it may be permitted to take an appeal from the decree entered in the above cause on the 23rd day of July, 1940, to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the Assignment of Errors which are filed herewith. And your Petitioner desires that the amount of security may be fixed by the order allowing the appeal.

Horace C. Wilkinson, Erle Pettus, Victor H. Smith,
Attorneys for Cloverleaf Butter Company, a Corporation.

All of Birmingham, Ala.

---

In United States District Court

Order Allowing Appeal—Filed July 23, 1940

The petition of the plaintiff in the above entitled cause for an appeal from the final decree rendered in said cause

[fol. 54] on the 23rd day of July, 1940, is hereby granted and an appeal is allowed upon Petitioner filing a bond in the sum of $250.00, with sufficient sureties, conditioned as required by law and approved by the Clerk of this Court.

This, the 23rd day of July, 1940.

C. B. Kennamer, United States District Judge.

Service accepted and further notice waived.
July 23, 1940.

C. L. Rowe, Asst. Attorney General, Of Counsel for Defendants.

---

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed July 23, 1940

Now comes the Cloverleaf Butter Company, the Appellant in the above entitled cause, and files the following Assignment of Errors upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause from the final decree of this Court, entered on the 23rd day of July, 1940:

First Assignment of Error

The Court erred in granting the motion of the Appellees (the defendants in the Court below) to dismiss the action.

[fol. 55] Second Assignment of Error

The Court erred in dismissing the action, and in the rendition of the final decree made and entered in said cause.

Horace C. Wilkinson, Erle Pettus, Victor H. Smith, Attorneys for Cloverleaf Butter Company, a Corporation.

---

IN UNITED STATES DISTRICT COURT

DESIGNATION OF RECORD—Filed July 23, 1940

Now comes the plaintiff, Cloverleaf Butter Company, a corporation, appellant and hereby designates record for appeal in said cause:

1. Original bill and exhibit thereto.
2. Motion of defendants to dismiss said bill.

2½. Decree of Court of July 18, 1940.
3. Stipulation of parties in said cause filed.
4. Opinion and final decree of said Court dismissing said bill:
5. Prayer for appeal.
6. Appellant's assignments of error.
[fol. 56] 7. Order allowing appeal.
8. Appeal bond to Circuit Court of Appeals.

Horace C. Wilkinson, Erle Pettus, Victor H. Smith,
As Attorneys for Appellant.

The undersigned as attorneys for appellee in said cause waive notice of designation of record and consents to the designation by appellant as herein stipulated as constituting the entire record material on appeal in said cause.

This the 23 day of July, 1940.

Thomas S. Lawson, C. L. Rowe, As Attorneys for Appellee.

[File endorsement omitted.]

[fol. 57] Cost Bond on Appeal for $250.00 approved and filed July 25, 1940 omitted in printing.

[fol. 58] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 59] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of October 23rd, 1940

No. 9647

CLOVERLEAF BUTTER COMPANY,

versus

HAYGOOD PATTERSON, as Commissioner of Agriculture and Industries of the State of Alabama, et al.

On this day this cause was called, and, after argument by Horace C. Wilkinson, Esq., and Erle Pettus, Esq., for appellant, and C. L. Rowe, Esq., Assistant Attorney General of Alabama, for appellees, was submitted to the Court.

---

[fol. 60] OPINION OF THE COURT AND DISSENTING OPINION THERETO OF HONORABLE RUFUS E. FOSTER, U. S. CIRCUIT JUDGE—Filed December 14, 1940

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 9647

CLOVERLEAF BUTTER COMPANY, Appellant,

versus

HAYGOOD PATTERSON, as Commissioner of Agriculture and Industries of the State of Alabama, et al., Appellees

Appeal from the District Court of the United States for the Middle District of Alabama

(December 14, 1940)

Before Foster, Hutcheson, and Holmes, Circuit Judges

HUTCHESON, Circuit Judge:

Plaintiff is an Alabama Corporation engaged in Alabama under United States license, in the business of manufacturing for sale and selling in Inter and Intrastate Commerce, processed or renovated butter. Defendants are officers of the Department of Agriculture of the state of Alabama,

[fol. 61] and citizens of that state. The suit, invoking federal jurisdiction upon the ground that more than $8,000 is involved, and a right arising under a federal statute is being violated, was against defendants to restrain them from seizing or suspending from use, country or packing stock butter moving in Interstate Commerce into Alabama and into plaintiff's plant for renovating and processing there.

The claim was that by the Congressional enactments [1] relating to processing or renovating butter and the regulations [2] promulgated pursuant thereto, Congress has preempted the field of manufacture of processed or renovated

---

[1] Act, May 19, 1902, Chapter 784, 32 Statutes 193, as amended, Title 26, Chap. 16, Secs. 2320, 2321, 2322, 2323, 2324, 2325, 2326 and 2327. Particular reliance is on Section 2325. "The Secretary of Agriculture shall make all needful regulations for carrying this section and sections 2326 (c) and 2327 (b) into effect and shall cause to be ascertained and reported from time to time the quantity and quality of process or renovated butter manufactured, and the character and the condition of the material from which it is made. And he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States or in courts of exportation or shipment he shall have power to confiscate the same. 53 Stat. 254."

[2] Bulletin known as Regulations No. 9,' revised April, 1936 and again revised December 24, 1936, in a bulletin titled, "Regulations for carrying into effect the process or renovated butter act." Particularly relied on of these regulations is Bulletin (d) of Article 30, page 74, Regulations No. 9: "(d) Deleterious products seizable.—The Secretary of Agriculture will determine whether or not materials being used in the manufacture of process or renovated butter will be deleterious to health or unwholesome in the finished product. If any materials which have been so determined to be deleterious to health or unwholesome in the finished product are found to be present in any process or renovated butter, intended for, or in course of, exportation or shipment in interstate commerce, such process or renovated butter will be confiscated."

butter in Interstate Commerce and of inspection and regulation of packing stock butter for use in such manufacture, to the exclusion of the state of Alabama, its officers and agencies. It was alleged that the raw material called country and packing stock butter from which the finished product is processed for sale, is bought in Interstate Commerce as well as in the state of Alabama and none of it is being [fol. 62] held or offered for sale in Alabama; that of the finished product called processed or renovated butter, approximately 90% is sold outside of Alabama; that since 1902, the federal government has fully and completely occupied and preempted the field of sanitary regulations of both the raw materials and finished product as well as the plant and industry; but that, notwithstanding all of this, defendants, as state officers, purportedly acting under the authority of state laws, but in fact acting beyond them, have recently entered into and sought to occupy the field of inspection and regulation of country and packing stock butter already preempted by the United States by attempting to duplicate the work required of the federal agencies and to exercise a kind of dual and, in some respects, exclusive control of the industry; that they have seized and suspended from use large quantities of country or packing stock butter moving in Interstate Commerce, and in addition, by contacting small producers in Alabama, some of plaintiff's sources of raw material, have intimidated them from selling to plaintiff; that the statutes of Alabama under color of which defendants are purporting to act, do not authorize the seizure of packing stock or country butter moving in Interstate Commerce to plaintiff's plant, they merely make it unlawful for any person within the state to manufacture for sale therein, have in his possession with intent to sell, offer or expose for sale, sell or deliver, any article of food or drugs which is adulterated or misbranded. Upon these and the further allegations that, unless restrained, defendants will continue their unlawful course of conduct to plaintiff's irreparable injury, an injunction was prayed.

It will be noted that it is not claimed that the state statutes are unconstitutional. It is, in fact, insisted that they are not, that they are limited to Intrastate Commerce and impose no restrictions which interfere with those fixed by Congress for Interstate Commerce. But the claim is that [fol. 63] the system of inspection provided by the federal government exempts plaintiff and its products from state

inspection and that state inspection in the face of such exemption is a violation of a federal right. Defendants moved to dismiss and there was a stipulation [3] intended to narrow;

[3] The parties to this cause stipulate and agree that the legal questions in dispute between the parties are:

1. Has Congress, by the enactments relating to renovated or process butter, pre-empted the field of inspection and regulation of the raw material, in interstate commerce, out of which such renovated or process butter is manufactured by the plaintiff as alleged in the bill, to the exclusion of the power of the State, its officers or agents to inspect and regulate the quality of such raw material?

2. Does the inspection of packing stock butter, in interstate commerce, used by the plaintiff in the manufacture of process or renovated butter as alleged in the bill of complaint, made or directed to be made by the Secretary of Agriculture of the United States, pursuant to the Federal laws and regulations relating to renovated or process butter, have the effect in connection with said Federal laws of excluding the State of Alabama, its officers and agents, from inspecting or seizing or suspending the packing stock butter, in interstate commerce out of which renovated butter to be sold in interstate commerce as alleged in the complaint is manufactured by the plaintiff as alleged in the complaint?

3. Under the Federal statutes, is the Secretary of Agriculture of the United States the sole judge, to the exclusion of State officers and agents, of the fitness and suitability of packing stock butter, in interstate commerce as alleged in the bill, for use by the plaintiff as raw material in the manufacture of renovated or process butter for sale in interstate commerce as alleged in the bill?

4. It is further stipulated and agreed that there is no conflict in the standards of the State of Alabama and the Federal Government, relating to the fitness or suitability of packing stock butter in interstate commerce to be used as raw material in the manufacture of renovated or process butter, and that this case be confined to the legal questions set out in paragraphs 1, 2, and 3, above.

5. It is agreed that the phrase "in interstate commerce" as used in this stipulation, shall be construed to mean "procured, transported, handled, or sold as alleged in the complaint", as the context may indicate.

and in fact narrowing, the legal questions in dispute. The District Judge saying: "The plaintiff contends Congress has preempted the field of inspecting and regulating packing stock and butter * * * the defendants contend otherwise, * * *, the chief difference between the parties is whether Congress has preempted the field of inspection and regulation of packing stock butter in Interstate Commerce to the exclusion of the power of the state of Alabama"; and, "that the state of Alabama through its duly authorized [fol. 64] officers may inspect the raw material known as packing stock butter, even though said raw material is in Interstate Commerce and is used by the plaintiff in the manufacture of processed or renovated butter to be sold in Interstate Commerce, and if upon inspection said packing stock butter violates any law of the state of Alabama, the same may be disposed of as provided by laws of said state.", held against plaintiff and with defendants.

Thus, there was sharply presented and decided in the court below, and there is as sharply presented for decision here, the question whether this is one of those cases in which the exercise of state police power, otherwise existing and exercisable, is prevented, not by direct congressional provision that it shall not be exercised, but by implication, from the comprehensive nature of federal statutes and regulations, that Congress has completely entered and preempted a field of regulation, and intends to exclude and has excluded the state from it.

Appellees, in limine, question our jurisdiction, insisting: (1) that the attack was upon the constitutionality of a statute and the district judge as a single judge, was without jurisdiction of the case, so that no appeal lies to this court from his decision; (2) that no substantial federal question was presented and there was no federal jurisdiction, and (3) that the suit is one against the state of Alabama and as such is forbidden by the 11th Amendment.

We reject these contentions as wholly without merit. The suit was not one for three judges. It did not attack the constitutionality of the Alabama statutes, it affirmed their constitutionality. It was not a suit against the state but one within the recognized federal jurisdiction against persons purporting to act as officers of a state and, as such, to deprive citizens of rights granted them by the federal con- [fol. 65] stitution and laws. Nor can it be said of it that it did not seriously present a substantial federal question.

For, if appellant is right in its contention that the federal statutes and regulations have completely occupied the field, so as to exclude the state of Alabama from the exercise of its police powers, with regard to the inspection and seizure for condemnation of country and packing stock butter, the actions of defendants under purported state authority, would be clearly in violation of a federal right and enjoinable as such.

We agree with the appellees however, that the district judge was right in denying the relief prayed and dismissing the bill as without merit. For, in our opinion, nothing in the act or regulations under it, expressly purports to prevent, or impliedly purports to exclude the state from making and enforcing like regulations with those the United States lays down, for the purity and wholesomeness of ingredients to be used in the process of manufacturing food products in Alabama for sale there and in other states.

Nothing in the act, the regulations, or the practices under the act, purport to expressly grant to plaintiff immunity from state seizure of food products which in the opinion of state officers, are filthy or deleterious in violation of Alabama laws. It must be admitted that the state of the authorities is such that there is much confusion to the casual and no little to the careful reader of them, as to when there is and when there is not such conflict between state and federal regulations of the same subject matter as to exclude the state from the field. This confusion is grounded in and springs in part from, the failure of some of the opinions to clearly apprehend and point out the differentiating facts in each situation. Particularly is it grounded in the failure to draw clearly enough the distinction between those cases [fol. 66] where a complainant, subject to federal regulation of some kind, is attempting to magnify and enlarge the actual scope of the federal law, to use it as a shield against, or a cat's-paw to draw his chestnuts from the fire as to state regulations, and those where, confronted with positively inconsistent and conflicting state and federal laws, and ordered, but unable, to comply with both, complainant, because of that inability, invokes, as paramount, the protection of the federal laws. But wanting in clearness as they are, nothing in any of the authorities lends support to the view that merely because Congress has taken cognizance of the business of making and shipping renovated or processed butter in Interstate Commerce, and has provided regula-

tions for such making and shipment, a state in which the manufacturing plant is situated and in which part the product is sold, may not make and enforce regulations not inconsistent with those of the Congress to insure the purity of the product so manufactured.

Here the imagined conflict between state and federal authorities lies only in the fact that the federal authorities have failed to seize and condemn particular lots of butter which the state has found seizable. There is no complaint on the part of the federal authorities of any interference with them by the authorities of the state. It is not claimed that the state is imposing any higher or other standards than the federal government imposes, indeed it is admitted that it is not. The sole claim is that in enforcing these non-conflicting standards the state has actually seized for condemnation, packing stock which United States inspectors have not so seized. The claim in short is, that the fact of its non-seizure by the federal inspectors is in effect, a certificate or finding that the articles are non-seizable, and therefore immune for state seizure.

We do not think that this will at all do. In the first place, in enacting the statute and regulations in question, the fed- [fol. 67] eral government was not concerned with interfering nor at all attempting to interfere, with any of the states in the matter of regulating the purity of this kind of product. The act is captioned: "An act to make oleomargerine and other imitation dairy products subject to the laws of any state or territory or the District of Columbia into which they are transported." In the first section of the act it is provided "all articles known as * * * processed, renovated * * * butter * * * transported into any state or territory or the District of Columbia and remaining therein for use, consumption, sale or storage, shall upon the arrival within the limits of such state or territory, be subject to the operation of the laws in such state or territory or the District of Columbia, enacted in the exercise of its police powers to the same extent and in the same manner as though such articles or substances had been produced in such state or territory and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

Now it is true that this section does not in terms refer to the ingredients, such as packing stock or country butter, from which the processed or renovated butter is manufac-

tured. But we would, we think, be blind to both the purpose and purport of the statute, if we implied from it that the Congress, which had declared that the finished product when introduced into a state would be subject to the laws of that state, intended by the act to exclude the state of manufacture from the regulation of the ingredients used in the manufacture with the result that persons might set up as manufacturers in particular states under the protection of Congress and then import into them and use in the manufacture of food products therein, impure or unfit products, free from inspection by and regulations of, the state, designed to prevent such importation and use. On the record before us, the complaint is not as to the manner of exercise, it is [fol. 68] as to the existence of the power. No complaint is made that the action of the state as to the particular products seized was unwarranted, capricious or unjust. Indeed, if the power to seize exists, no such complaint could be made, for the procedure provided for by the state act makes full provision for a hearing and permits the owner to fully contest the grounds of seizure. Thus, boiled down to its ultimate, the contention of the appellant comes only to this; that because and only because, Congress has enacted laws and authorized regulations under which appellant has been licensed to and has set up a manufacturing establishment in Alabama, it must be implied that it intended to authorize appellant to bring to its manufacturing establishment in that state for use in processing, completely free from inspection and seizure by the state, any kind of packing house or country butter it pleases. That in short, this conclusion must be drawn because, and only because the federal government has adopted acts and regulations under which it may inspect and seize and confiscate such products in the interest of the public health and safety.

It is not claimed that the state is attempting to seize renovated or processed butter after all the processes of manufacture have ceased and its movement in Interstate Commerce has begun.

All that the state is purporting to interfere with here is raw material, brought into and gathered in the state for use in a state plant, in the manufacture in the state of an article of commerce, which when manufactured goes both into Interstate and Intrastate Commerce, and does so in such condition that it is then impossible for the state or the

government to detect in it the impurities existing and obvious in the packing stock.

The authorities on which appellant relies are all, we think, when understood in the light of later authorities, clearly [fol. 69] distinguishable from this case. Without the aid of, Mintz v. Baldwin, 289 U. S. 346; Pacific States Co. v. White, 296 U. S. 476; Kelley v. Washington, 302 U. S. 1; S. C. Highway Dept. v. Barnwell Bros., 303 U. S. 177; Townsend v. Yoeman, 301 U. S. 454; Currin v. Wallace, 306 U. S. 1; the cases of Oregon-Washington R. R. Co. v. Washington, 270 U. S. 87 and Napier v. Atlantic Coastline Co., 272 U. S. 606, on which plaintiff strongly relies, might give us some difficulty. When we read in Mintz v. Baldwin, "the purpose of Congress to supersede or exclude state action against the ravages of disease, is not lightly to be inferred. The intention so to do must definitely and clearly appear," and to the same effect in the other late cases, we get our bearings and stand on firm ground again. The cases on which appellees rely are nearer in point. They establish the doctrine that state officers enforcing by seizure police regulations with regard to foods, will not be enjoined at the suit of persons complaining of them merely because there exist similar federal laws and regulations in respect to the same subject matter and there has been no federal seizure.

Relief from the enforcement of state police regulations upon the claim that federal regulations have preempted the field, requires much more to be shown. It must appear that there is in effect an express prohibition against state regulation or that there is such an essential conflict between state and federal laws and regulations as that compliance with the one is defiance of the other and therefore, a prohibition against state regulations must be implied. No such case is made here. It is not claimed that the state and federal standards are in conflict. It is not even claimed that the federal government has actually inspected and passed the particular products the state has seized. The claim is merely that because the federal government has the right to inspect, seize and condemn, complainant has a federal [fol. 70] right to exemption from state government inspection and seizure. We do not think so. The district judge was right in finding and adjudging that there was no equity in complainant's bill. His judgment is

Affirmed.

FOSTER, Circuit Judge, dissenting:

I disagree with the conclusions of the majority in this case for the following reasons:

In addition to other allegations referred to in the majority opinion, the bill alleges that between the 17th day of April, 1939 and the 22nd day of June, 1940, on sixteen separate occasions the state officers seized a total of 20,924 pounds of packing stock butter, which originated in whole or in part in states outside of Alabama, which had been delivered to plaintiffs' plant at Birmingham as raw material and was not being sold, offered or exposed for sale, or admitted for sale in its then condition but was being held by plaintiffs solely and exclusively for the manufacture of renovated butter in the usual course of business. The Alabama officers were acting under authority of the Alabama Agricultural Code. In State vs. Cecil, 216 Ala. 391, it was held the enactment of the Agricultural Code was within the exercise of the police power of the state but the operation of the code was confined to intrastate commerce. Conceding that the Alabama regulations are practically the same as the Federal regulations I consider that Congress has preempted and completely occupied the field as to the manufacture of processed butter for sale and shipment in interstate commerce. The law of Alabama, enforced by state officers, should not be permitted to inter- [fol. 71] fere with the Federal Statute and regulations in respect to shipments in interstate commerce. The bill was dismissed on motion without a trial on the merits. Of course, appellant would have a remedy at law to test the validity of each seizure but where seizures have been so frequent, and no doubt will continue, if appellant operates its plant, the remedy at law would not be so complete and adequate as to oust jurisdiction in equity. I consider the judgment of the District Court should be reversed and the case remanded.

52

[fol. 72] JUDGMENT

Extract from the Minutes of December 14th, 1940

No. 9647

CLOVERLEAF BUTTER COMPANY

vs.

HAYGOOD PATTERSON, as Commissioner of Agriculture and Industries of the State of Alabama, et al.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Middle District of Alabama; and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, Cloverleaf Butter Company, and the surety on the appeal bond herein, Commercial Casualty Insurance Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

"Foster, Circuit Judge, dissents."

53

[fol. 76] ORDER DENYING REHEARING

Extract from the Minutes of January 14th, 1941

No. 9647

CLOVERLEAF BUTTER COMPANY

versus

HAYGOOD PATTERSON, as Commissioner of Agriculture and Industries of the State of Alabama, et al.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.
"Foster, Circuit Judge, dissents."

---

[fol. 77] IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

Number 9647

CLOVERLEAF BUTTER COMPANY, Appellant,

vs.

HAYGOOD PATTERSON, et al., Appellees

MOTION AND ORDER STAYING MANDATE—Filed January 22nd, 1941

Now comes said appellant by its attorneys and by leave of Court hereby moves the Court to stay the issuance of a mandate in said cause pending appellant's petition or application for certiorari To The Supreme Court of The United States and pending decision of said Supreme Court.

Appellant respectfully represents to the Court that the withholding or staying of said mandate as herein moved for will not prejudice appellees in this cause.

(Signed) Horace C. Wilkinson, Erle Pettus, and Victor H. Smith, as Attorneys for the Appellant.

[fol. 78] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 9647

CLOVERLEAF BUTTER COMPANY, Appellant,

versus

HAYGOOD PATTERSON, as Commissioner of Agriculture and Industries of the State of Alabama, et al., Appellees

On Consideration of the Application of the Appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 22nd day of January, 1941.

(Signed) J. C. Hutcheson, Jr., United States Circuit Judge.

---

[fol. 79] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 80] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 7, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 45,130. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 781. Cloverleaf Butter Company, Petitioner, vs. Haygood Patterson, as Commissioner of Agriculture and Industries of the State of Alabama, et al. Petition for a writ of certiorari and exhibit thereto. Filed February 21, 1941. Term No. 781 O. T. 1940.

(4255)

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1940**

---

**No. ~~781~~ 28**

---

CLOVERLEAF BUTTER COMPANY, A CORPORATION,
*Petitioner,*

*vs.*

HAYGOOD PATTERSON AS COMMISSIONER OF AGRICULTURE & INDUSTRIES OF THE STATE OF ALABAMA, AND GEORGE H. MARSH AS DIRECTOR OF THE DIVISION OF AGRICULTURAL CHEMISTRY IN THE DEPARTMENT OF AGRICULTURE & INDUSTRIES OF THE STATE OF ALABAMA.

---

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.**

---

HORACE C. WILKINSON,
ERLE PETTUS,
VICTOR H. SMITH,
*Counsel for Petitioner.*

# INDEX.

## Subject Index.


| | Page |
|---|---|
| Petition for writ of certiorari | 1 |
| Summary statement of matter involved | 2 |
| Opinions below | 8 |
| Jurisdiction | 9 |
| Reasons relied on for allowance of writ | 10 |
| Questions presented | 13 |
| Specification of errors | 13 |
| Prayer for writ | 14 |
| Appendix—Renovated Butter Act, 28 U. S. C. A. 990-996; now Section 2320, et seq. of the Internal Revenue Code | 16 |
| —Pertinent sections meat inspection laws, 21 U. S. C. A. 7-29 | 21 |
| —Regulation No. 9 of U. S. Treasury Department, Bureau of Internal Revenue, relating to the taxes on oleomargarine, adulterated butter, etc. | 26 |
| —B. D. I. Order No. 1—Regulations for carrying into effect the process of renovated butter act | 27 |
| —Sections of Alabama Agricultural Code of 1927 | 33 |


## Table of Cases Cited.


| | |
|---|---|
| *Adams Express Co.* v. *Croninger*, 226 U. S. 491 | 11 |
| *Charleston & W. C. R. R. Co.* v. *Varnville Furniture Co.*, 237 U. S. 597 | 11 |
| *C., R. I. & P. Co.* v. *Hardwick Co.*, 226 U. S. 426 | 11 |
| *Currin* v. *Wallace*, 306 U. S. 1 | 13 |
| *Erie R. R.* v. *New York*, 233 U. S. 671 | 11 |
| *Erie R. R.* v. *Tompkins*, 304 U. S. 64 | 12 |
| *Erie R. R. Co.* v. *Winfield*, 244 U. S. 170 | 11 |
| *Hines* v. *Davidowitz*, 61 Sup. Ct. Rep. 399 | 11 |

Page

*Kelly* v. *Washington*, 302 U. S. 1 ..... 13
*Lemke* v. *Farmers Grain Co.*, 258 U. S. 50 ..... 9
*L. & N. R. R. Co.* v. *State*, 16 Ala. App. 199 ..... 11
*Mintz* v. *Baldwin*, 298 U. S. 346 ..... 12
*Missouri-Pacific R. R.* v. *Stroud*, 267 U. S. 404 ..... 11
*Napier* v. *Atlantic Coast Line R. R. Co.*, 272 U. S. 606 ..... 11
*New York Central R. R.* v. *Winfield*, 244 U. S. 147 ..... 11
*Northern Pacific R. R.* v. *Washington*, 222 U. S. 370 ..... 11
*Oregon-Washington R. R. Co.* v. *Washington*, 270 U. S. 87 ..... 11
*Pacific States* v. *White*, 296 U. S. 176 ..... 13
*South Carolina Highway Dept.* v. *Barnwell*, 303 U. S. 177 ..... 13
*Southern R. R.* v. *Reid*, 222 U. S. 424 ..... 11
*State* v. *Cecil*, 216 Ala. 391 ..... 3
*Townsend* v. *Yeomans*, 301 U. S. 441 ..... 13

STATUTES CITED.

Act of Congress of August 10, 1912, 37 Stat. 273 (26 U. S. C. A. 997(b) (c)) ..... 6
Alabama Agricultural Code of 1927 (Ala. Gen. Acts, 1923, 390-550):
Section 37 ..... 4
Section 39 ..... 7
Section 71 ..... 6
Internal Revenue Code:
Sec. 2325 ..... 5
Sec. 2327 ..... 7
Judicial Code, Sec. 240, as amended (28 U. S. C. A. 347) ..... 9
Meat and Inspection Act of June 30, 1906, 34 Stat. 676 as reenacted March 4, 1907, 34 Stat. 1260-1265 ..... 5
Renovated Butter Act, approved May 19, 1902, 32 Stat. 193-197 ..... 4
Renovated Butter Act, approved May 9, 1902, as amended (U. S. C. A.), Internal Revenue Code Chap. 16, Sections 2320 to 2327 ..... 9

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1940**

---

# No. 781

---

CLOVERLEAF BUTTER COMPANY, A CORPORATION,
*Petitioner, and Appellant below,*

*vs.*

HAYGOOD PATTERSON AS COMMISSIONER OF AGRICULTURE & INDUSTRIES OF THE STATE OF ALABAMA, AND GEORGE H. MARSH AS DIRECTOR OF THE DIVISION OF AGRICULTURAL CHEMISTRY IN THE DEPARTMENT OF AGRICULTURE & INDUSTRIES OF THE STATE OF ALABAMA,
*Respondents, and Appellees below.*

---

## PETITION FOR WRIT OF CERTIORARI.

---

*To the United States Circuit Court of Appeals for the Fifth Circuit*

*To the Honorable Supreme Court of the United States:*

Your petitioner, the Cloverleaf Butter Company, a corporation, organized under the laws of the State of Alabama, respectfully prays that a writ of certiorari issue out of this Honorable Court to review the final decree of the United

States Circuit Court of Appeals for the Fifth Circuit, rendered in the above entitled cause on the 14th day of January, 1941, and reported in the 116 F. (2d) at page 227, whereby the said Circuit Court of Appeals overruled petitioner's application for a rehearing of the judgment or decree rendered by said court on the 14th day of December, 1940, wherein said Circuit Court of Appeals affirmed the judgment and decree of the District Court of the United States for the Middle District of Alabama rendered in said cause on the 23rd day of July, 1940, dismissing petitioner's action on motion of respondent's without a hearing on the merits, and in support of its petition for a writ of certiorari this petitioner respectfully shows:

## I.

### Summary Statement of the Matter Involved.

Petitioner is engaged, under Federal license, and has been so engaged for 20 years, in the manufacture of renovated butter for sale and shipment in interstate commerce at its plant in Birmingham.

Country butter—known to the trade as packing stock butter—bought in interstate commerce and concentrated at petitioner's plant solely for the purpose of manufacture, is the basic raw material used in the manufacture of renovated butter for sale and shipment in interstate commerce.

Renovated or process butter is manufactured by melting the country butter and then washing, straining, cleansing, pasteurizing, clarifying and refining the melted butter fat and mixing it with a pasteurized milk product and rechurning it.

During the time that petitioner has been in the renovated butter business the Federal Government has exercised exclusive control of the sanitary inspection and regulation of

the manufacture of renovated butter for sale and shipment in interstate commerce as required by Section 2325 I. R. C., which provides:

> "The Secretary of Agriculture is authorized and required to cause a rigid sanitary inspection to be made at such times as he may deem proper or necessary, of all factories, and storehouses where process or renovated butter is manufactured, packed or prepared for market, and of the products thereof and materials going into the manufacture of the same. * * * And he shall also have the power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into the States or in course of exportation in shipment he shall have power to confiscate the same."

About the middle of April, 1939 the respondents, who are officers of the State of Alabama, began to seize petitioner's packing stock butter in interstate commerce. This series of seizures, aggregating 20,924 pounds contained until the bill was filed in the District Court about 14 months later. And, all of the butter seized was being held by the respondents at the time the bill was filed. The respondents claim that they are acting under the Alabama Agricultural Code of 1927, which is a substantial reenactment of the 1923 Act. Ala. Gen. Acts, 1923, 399-550.

This Act was construed by the Supreme Court of Alabama in *State* v. *Cecil*, 216 Ala. 391. In that case it was held the enactment of the Agricultural Code was in the exercise of the police power of the State, *but the operation of the Code was confined to intrastate commerce.*

Petitioner's employs some 25 people in its Birmingham plant. The effect of the repeated seizures of raw material at different times seriously interfered with the operation of

Petitioner's plant, caused a shutdown of the plant at different times, and its employees to be demoralized and remain idle from time to time, along with great financial loss to Petitioner, and placed an intolerable burden on interstate commerce (R. 3-23).

To prevent a repetition, and threatened continuance of the seizure of Petitioner's packing stock butter in interstate commerce, Petitioner filed a bill in the District Court of the United States for the Middle District of Alabama against the Commissioner of Agriculture and Industries of the State of Alabama, and the Director of the Division of Agricultural Chemistry in the Department of Agriculture and Industries of the State of Alabama, seeking to enjoin and restrain them from seizing Petitioner's packing stock butter moving in interstate commerce to Petitioner's plant in Birmingham, Alabama; also to enjoin and restrain them from seizing Petitioner's raw material in interstate commerce in Petitioner's plant for manufacture into process or renovated butter for sale and shipment in interstate commerce (R. 3-23).

The jurisdiction of the District Court was asserted under the Acts of Congress, known as the Renovated Butter Act, and Regulations promulgated thereunder, and upon the ground that more than $8,000.00 was involved and a right arising under a Federal Statute was being violated as was found by the United States Circuit Court of Appeals for the Fifth Circuit.

The Record shows that the regulation of process or renovated butter in interstate commerce originated in an Act of Congress, known as the Renovated Butter Act, approved on May 9, 1902, 32 Stat. 193-197. This was amended by an Act of Congress approved August 10, 1912 entitled "An Act for Making Appropriations for the Department of Agriculture for the Fiscal Year ending June 30, 1919" (37 Stat. 273) and extended the applicable provisions of the

Meat and Inspection Act of June 30, 1906, 34 Stat. at Large 676, as reenacted March 4, 1907, 34 Stat. 1260-1265, to the Renovated Butter Industry.

Pursuant to the Acts of Congress, both the Secretary of Agriculture and the Treasury Department have promulgated "regulations for carrying into effect the process or renovated butter act".

In Section 5 of the original Renovated Butter Act, later Section 995 U. S. C. A., Title 26, now Section 2325 of the I. R. C. provides:

> "SEC. 2325. INSPECTION, MANUFACTURE, AND MARKETING OF PROCESS OR RENOVATED BUTTER.
>
> *The Secretary of Agriculture is authorized and required to cause a rigid sanitary inspection to be made, at such times as he may deem proper or necessary, of all factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market, and of the products thereof and materials going into the manufacture of the same.* All process or renovated butter and the packages containing the same shall be marked with the words "Renovated Butter" or "Process Butter" and by such other marks, labels, or brands and in such manner as may be prescribed by the Secretary of Agriculture, and no process or renovated butter shall be shipped or transported from its place of manufacture into any other State or Territory or the District of Columbia, or to any foreign country, until it has been marked as provided in this section. *The Secretary of Agriculture shall make all needful regulations for carrying this section and sections 2326 (c) and 2327 (c) into effect and shall cause to be ascertained and reported from time to time the quantity and quality of process or renovated butter manufactured, and the character and the condition of the material from which it is made. And he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious*

*to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States or in course of exportation or shipment he shall have power to confiscate the same."* (Emphasis supplied).

The Regulations are set out in original record beginning page 27. Pertinent parts are set out here in appendix.

In the Agricultural Department Appropriation Act of August 10, 1912, codified as Section 997 (b) (c), Title 26 U. S. C. A. it was provided:

> "That the sanitary provisions for slaughtering, meat canning, or similar establishments as set forth in the Act of June 30, 1906, 34 Stat. 676, are hereby extended to cover renovated butter factories as defined in the Act of May 9, 1902 under such regulations as the Secretary of Agriculture may prescribe."

This Statute is now Section 2327 of the I. R. C. The Meat Inspection Acts are codified as Sections 71 to 93 of Title 21 U. S. C. A. The pertinent sections being set out in the appendix.

In Regulation 4, Section 1, a rigid sanitary inspection is required to be made of the character and condition of the materials going into the manufacture of process or renovated butter.

In Regulation 7 the Secretary of Agriculture prescribed in detail *the method* by which it is to be determined whether or not materials used in the manufacture of process or renovated butter are deleterious to health or unwholesome in the finished product.

Section 71 of the Alabama Agricultural Code, 1927 recognizes renovated butter manufactured from original packing stock butter as a legitimate article of commerce and requires

it to be labeled renovated butter when sold in the State. This is the only Alabama Statute making reference to, or attempting to regulate renovated butter.

Section 37 of the Alabama Agricultural Code, 1927 provides:

> "37. Possession: Sale and Delivery of Prohibited Articles.—No person within this State shall manufacture for sale therein, have in possession with intent to sell, offer or expose for sale, sell, or deliver *any article of food* or drugs *which is adulterated* or misbranded within the meaning of this Article."

In Section 39 it is also provided:

> "An article shall be deemed adulterated *in the case of food:* * * * Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, * * *"

The respondent officers of the State of Alabama acting under the color of these provisions and pursuant to the authority they claim the statutes confer on them, seized at different times, the 16 different lots of raw material in interstate commerce (R. 14-15).

The respondents will, unless enjoined and restrained, continue to interfere with Petitioner's business by inspecting, seizing and holding raw material in interstate commerce used by Petitioner in the manufacture of process butter for sale or shipment in interstate commerce (R. 16).

In the District Court the respondents moved to dismiss the bill on two grounds, (1) because the complaint failed to state a claim against the defendants upon which relief can be granted, and (2) because there was no diversity of citizenship and no substantial Federal question presented (R. 45).

By written stipulation the parties eliminated questions of fact and confined the case to questions of law which, briefly stated, were:

(1) Has Congress preempted and completely occupied the field as to the manufacture of process butter for sale and shipment in interstate commerce?

(2) Is inspection and seizure of packing stock butter in interstate commerce by State officers excluded by the Federal Statutes and Regulations?

(3) Is the Secretary of Agriculture of the United States the sole judge of the fitness and suitability of packing stock butter in interstate commerce for use in the manufacture of process or renovated butter for sale and shipment in interstate commerce?

(4) It was also stipulated that: State and Federal standards relating to the fitness and suitability of packing stock butter in interstate commerce are not in conflict (R. 48).

## II.

### Opinions Below.

No opinion was rendered by the District Court, other than an expression in its decree on page 51 of the record.

The opinion of the Circuit Court of Appeals is reported in 116 F. (2d) 227, where it was held by the majority of the court that to obtain relief from enforcement of State police regulation upon the claim the Federal Regulations have preempted the field it must appear that there is in effect an express prohibition against State regulation or there is such an essential conflict between State and Federal Laws and Regulations as that compliance with the one is defiance of the other, and therefore a prohibition against State regulation must be implied, and that State officers enforcing seizure police regulation with regard to foods, will not be

enjoined at the suit of persons complaining of them merely because there exists similar Federal laws and regulations in respect to the same subject matter and there has been no Federal seizure.

## III.

### Jurisdiction.

The jurisdiction of this Honorable Court is invoked under Section 240 of the Judicial Code as amended, by Acts of February 13, 1925, Subsections (a) and (b) separately and severally, U. S. C. A., Title 28, Section 347, and also rule 38 of the revised rules of the Supreme Court of the United States adopted February 13, 1939.

*Lemke* v. *Farmers Grain Co.*, 258 U. S. 50.

## IV.

### Reasons Relied On for the Allowance of the Writ.

1. United States Circuit Court of Appeals for the Fifth Circuit, in construing the Renovated Butter Act of May 9, 1902, as amended, U. S. C. A. Int. Rev. Code Chap. 16, Sections 2320 to 2327, decided an important question of Federal law, which has not been, but should be settled by this Court. The importance of the question arises from the fact that Congress by special enactment has taken over the regulation of the renovated butter industry in interstate commerce; it has by reference and adoption extended all applicable provisions of the meat inspection laws to the same industry; the renovated butter industry has an important place in interstate commerce and the meat industry at the present time is one of the major sources of the Nation's food supply, the importance of which cannot be exaggerated. The majority opinion of the Circuit Court of Appeals in this case has left the construction and application of the

statutes involved in a state of confusion and uncertainty as to which sovereignty shall control the subject matter in interstate commerce, the effect of the opinion being to hold that State authorities may intervene and to invite them to exercise joint control with the agencies appointed by Congress.

Petitioner claims the right, under the Federal statutes, to have packing stock butter transported in interstate commerce to its plant in Birmingham, Alabama, for the purpose of being there manufactured into a pure and wholesome process butter, for sale and shipment in interstate commerce, without interference on the part of the respondents who are officers of the State of Alabama.

The respondents, officers of the State of Alabama, assert the right to seize packing stock butter even *before it reaches its destination* moving in interstate commerce to petitioner's plant in Birmingham for the sole purpose of being manufactured into a pure and wholesome finished product for sale and shipment in interstate commerce.

They also assert the right to seize packing stock butter which has been transported to petitioner's plant in Birmingham, Alabama, for the purpose of being there manufactured into a pure and wholesome finished product, for shipment and sale in interstate commerce, after delivery to said plant, and during the temporary period it is held pending its manufacture into renovated butter, for sale and shipment in interstate commerce.

2. The Circuit Court of Appeals decided an important question of Federal law very probably in conflict with applicable decisions of this Court.

Petitioner earnestly insists that *Federal legislation specifically requiring the United States Secretary of Agriculture to inspect packing stock butter in interstate commerce excludes like action by State officers*, and that any State

legislation purporting to authorize State officers to inspect the commodity in interstate commerce would be superseded by the Federal law.

The Court of Appeals, in effect, holds that Congress must go further than legislation specifically requiring the inspection before action by State officers is excluded. The court holds, in effect, that Congress must, in addition to requiring Federal inspection, also prohibit State legislation on the same subject, and in applying the rule the court held that *before State inspection will be enjoined* it must appear (1) that the Federal Government either passed the commodity seized by the State, or (2) that the Federal Government seized it before it was seized by the State inspectors, leaving the State free to seize any packing stock butter not actually inspected and passed or seized by the Federal Government.

The Renovated Butter Act and the Regulations promulgated thereto are not less comprehensive with respect to the subject matter involved than the Federal statutes construed in the following cases:

*Hines* v. *Davidowitz* (M. M. S.), 61 Sup. Ct. Rep. 399;
*Oregon-Washington R. R. Co.* v. *Washington*, 270 U. S. 87;
*Napier* v. *Atlantic Coast Line R. R. Co.*, 272 U. S. 606;
*Northern Pacific R. R.* v. *Washington*, 222 U. S. 370;
*So. R. R.* v. *Reid*, 222 U. S. 424;
*Missouri-Pacific R. R.* v. *Stroud*, 267 U. S. 404;
*L. & N. R. R. Co.* v. *State*, 16 Ala. App. 199;
*C. R. I. & P. Co.* v. *Hardwick Co.*, 226 U. S. 426;
*Adams Express Co.* v. *Croninger*, 226 U. S. 491;
*Erie R. R.* v. *New York*, 233 U. S. 671;
*New York Central R. R.* v. *Winfield*, 244 U. S. 147;
*Erie R. R. Co.* v. *Winfield*, 244 U. S. 170;
*Charleston & W. C. R. R. Co.* v. *Varnville Furniture Co.*, 237 U. S. 597.

In each case it was held that by the Act involved, Congress had completely occupied the field with respect to the subject matter of the legislation to the exclusion of State action.

3. The highest court in Alabama decided that the operation of the Ala. Ag. Code was confined to intrastate commerce. *State* v. *Cecil*, 216 Ala. 391.

The United States Circuit Court of Appeals for the Fifth Circuit held in effect that the Ala. Ag. Code was not confined in its operation to intrastate commerce, but authorized the respondent officers to interfere with packing stock butter in interstate commerce. The ruling of the United States Circuit Court of Appeals is in conflict with the rule announced by this Court in *Erie R. R.* v. *Tompkins*, 304 U. S. 64, where it was held in effect that United States courts must follow the construction placed on the State statute by the highest court in the State.

4. The decision of the United States Circuit Court of Appeals for the Fifth Circuit is in irreconciliable conflict with certain decisions of this Honorable Court in which it was decided that where the State action complained of was within the scope of the authority delegated to an officer or instrumentality of the United States, State action was excluded. The cases are:

*Oregon-Washington R. R. Co.* v. *Washington*, 270 U. S. 87;

*Napier* v. *Atlantic Coast Line R. R. Co.*, 272 U. S. 606;

*Hines* v. *Davidowitz* (mms.), 61 Supreme Court Reporter, 399.

And numerous other cases.

5. The United States Circuit Court of Appeals for the Fifth Circuit erroneously ruled that *Mintz* v. *Baldwin*, 298

U. S. 346; *Pacific States* v. *White*, 296 U. S. 176; *Kelly* v. *Washington*, 302 U. S. 1; *South Carolina Highway Dept.* v. *Barnwell*, 303 U. S. 177; *Townsend* v. *Yeomans*, 301 U. S. 441; *Currin* v. *Wallace*, 306 U. S. 1, supports its holding that to obtain relief from enforcement of State police regulations upon the claim that Federal regulations have preempted the field, it must appear that there is such an essential conflict between State and Federal laws and regulations as that compliance with the one is defiance of the other, *and therefore, a prohibition against State regulation must be implied*, and that State officers enforcing by seizure police regulations with respect to foods will not be enjoined at the suit of persons complaining of them merely because there exists similar Federal laws and regulations in respect to the same subject matter and there has been no Federal seizure.

## Questions Presented.

The controlling question is, whether Congress has preempted and completely occupied the field of inspection of raw material in interstate commerce, for manufacture into process butter for sale and shipment in interstate commerce, to the exclusion of State regulation.

A secondary question is, whether the State of Alabama has authorized its officers to seize raw material, moving in interstate commerce, for the purpose of being processed or renovated in Alabama for sale and shipment in interstate commerce.

## Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In affirming the decree of the United States District Court for the Middle District of Alabama.

2. In holding, in effect, that Congress has not preempted the field as to the inspection and regulation of raw material

in interstate commerce for manufacture into processed butter for sale and shipment in interstate commerce.

3. In holding, in effect, that the Alabama statute (the Alabama Agricultural Code) authorizes officers of the State of Alabama to seize raw material moving in interstate commerce for manufacture into processed butter for sale and shipment in interstate commerce.

4. In holding, in effect, that State officers may supplement and duplicate the work of the Federal Government in policing raw material in interstate commerce going into the manufacture of process butter for sale and shipment in interstate commerce.

5. In holding, in effect, that to obtain relief from enforcement of State Police Regulations upon the claim that Federal Regulations have preempted the field, it must appear that there is *an express or implied prohibition against State regulations.*

6. In holding, in effect, that to obtain relief from enforcement of State Police Regulations upon the claim that Federal Regulations have preempted the field, it must appear that there is such an essential conflict between State and Federal laws and regulations as that compliance with the one is defiance of the other, and therefore a prohibition against State regulation must be implied.

7. In holding, in effect, that State officers enforcing by seizure police regulations with regard to foods, will not be enjoined at the suit of persons complaining of them merely because there exist similar Federal laws and regulations in respect to the same subject matter and there has been no Federal seizure.

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United

States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said court had in the case numbered and entitled on its docket, #9647, *Cloverleaf Butter Company, Appellant,* v. *Haygood Patterson, as Commissioner of Agriculture & Industries of the State of Alabama, et al., Appellees,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said United States Circuit Court of Appeals for the Fifth Circuit be reversed by the Court and for such other relief as to this Court may seem proper.

February 21st, 1941.

CLOVERLEAF BUTTER COMPANY,
By ERLE PETTUS,
HORACE C. WILKINSON,
VICTOR H. SMITH,
*Counsel for Petitioner.*

# APPENDIX.

FEDERAL STATUTES.

FEDERAL REGULATIONS.

STATE STATUTES.

## FEDERAL STATUTES.

### Renovated Butter Act.

U. S. C. A., Title 26, Sections 990-996; now § 2320, et seq., of the Internal Revenue Code:

"Sec. 990. Definitions.

"(a) Butter. For the purpose of this chapter and sections 1366, and 1367, the word 'butter' shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter.

"(b) Adulterated Butter. 'Adulterated butter' is defined to mean a grade of butter produced by mixing, reworking, rechurning in milk or cream, refining, or in any way producing a uniform, purified, or improved product from different lots or parcels of melted or unmelted butter or butter fat, in which any acid, alkali, chemical, or any substance whatever is introduced or used for the purpose or with the effect of deodorizing or removing therefrom rancidity, or any butter or butter fat, with which there is mixed any substance foreign to butter as defined in subsection (a), with intent or effect of cheapening in cost the product of any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk, or cream.

"(c) Process or Renovated Butter. 'Process butter' or 'renovated butter' is defined to mean butter which has been subjected to any process by which it is melted, clarified or

refined and made to resemble genuine butter, always excepting 'adulterated butter' as defined by subsection (b).

"Sec. 991. Tax.

"(a) Rate—(1) Adulterated Butter. Upon adulterated butter, when manufactured or sold or removed for consumption or use, there shall be assessed and collected a tax of 10 cents per pound, and any fractional part of a pound shall be taxed as a pound. (May 9, 1902, c.)

"(2) Process or Renovated Butter. Upon process or renovated butter, when manufactured or sold or removed for consumption or use, there shall be assessed and collected a tax of one-fourth of 1 cent per pound, and any fractional part of a pound shall be taxed as a pound.

"(b) By Whom Paid. The tax to be levied by subsection (a) shall be paid by the manufacturer.

"(c) How Paid—(1) Stamps. The tax to be levied by subsection (a) shall be represented by coupon stamps.

"Sec. 992. Manufacturers.

"(a) Definition. Every person who engages in the production of process or renovated butter or adulterated butter as a business shall be considered to be a manufacturer thereof.

"(b) Packing, Stamping, and Selling Requirements—(1) Adulterated Butter. All adulterated butter shall be packed by the manufacturer thereof in firkins, tubs, or other wooden, tin-plate, or paper packages not before used for that purpose, containing, or encased in a manufacturer's package made from any of such materials of, not less than ten pounds, and marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, and all sales made by manufacturers of adulterated butter shall be in original, stamped packages. Every manufacturer of adulterated butter shall securely affix, by pasting, on each package containing adulterated butter manufactured by him a label on which shall be printed, besides the number of the

manufactory and the district and State in which it is situated, these words:

"'Notice.—That the manufacturer of the adulterated butter herein contained has complied with all the requirements of law. Every person is cautioned not to use either this package again or the stamp thereon, nor to remove the contents of this package without destroying said stamp, under the penalty provided by law in such cases.'

"(c) Books and Returns. Every manufacturer of process or renovated butter or adulterated butter shall file with the collector of the district in which his manufactory is located such notices and inventories, shall keep such books and render such returns of material and products, and conduct his business under such surveillance of officers and agents as the Commissioner, with the approval of the Secretary, may by regulation require.

"(d) Factory Number and Signs. Every manufacturer of process or renovated butter or adulterated butter shall put up such signs and affix such number to his factory as the Commissioner, with the approval of the Secretary, may by regulation require.

"(e) Bonds. Every manufacturer of process or renovated butter shall file with the collector of the district in which his manufactory is located such bonds as the Commissioner, with the approval of the Secretary, may by regulation require. But the bond required of such manufacturer shall be with sureties satisfactory to the collector and in a penal sum of not less than $500; and the sum of said bond may be increased from time to time and additional securities required at the discretion of the collector or under instructions of the Commissioner.

"Sec. 993. Dealers in Adulterated Butter.

"(a) Dealer Defined. Every person who sells adulterated butter shall be regarded as a dealer in adulterated butter.

"(b) Retail Dealer Defined. Every person who sells adulterated butter in less quantities than ten pounds at

one time shall be regarded as a retail dealer in adulterated butter.

"(c) Selling Requirements. Dealers in adulterated butter must sell only original or from original stamped packages, and when such original stamped packages are broken the adulterated butter sold from same shall be placed in suitable wooden, tinplate, or paper packages, which shall be marked and branded as the Commissioner, with the approval of the Secretary, shall prescribe.

"Sec. 994. Books and Returns of Wholesale Dealers in Adulterated and Process or Renovated Butter. Wholesale dealers in process, renovated, or adulterated butter shall keep such books and render such returns in relation thereto as the Commissioner, with the approval of the Secretary, may, by regulation, require; and such books shall be open at all times to the inspection of any internal revenue officer or agent.

"Sec. 995. Inspection, Manufacture, Storage, and Marking of Process or Renovated Butter.

"The Secretary of Agriculture is authorized and required to cause a rigid sanitary inspection to be made at such times as he may deem proper or necessary; of all factories and storehouses where process or renovated butetr is manufactured, packed, or prepared for market and of the podnets thereof and materials going into the manufacture of the same. All process or renovated butter and the packages containing the same shall be marked with the words 'Renovated Butter' or 'Process Butter' and by such other marks, labels, or brands and in such manner as may be prescribed by the Secretary of Agriculture, and no process or renovated butter shall be shipped or transported from its place of manufacture into any other State or Territory or the District of Columbia, or to any foreign country, until it has been marked as provided in this section. The Secretary of Agriculture shall make all needful regulations for carrying this section and sections 996(c) and 997(b) into effect and shall cause to be ascertained and reported from time to time the quantity and quality of process or renovated butter manufactured, and the character and con-

dition of the material from which it is made. And he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States or in course of exportation or shipment he shall have power to confiscate the same.

"Sec. 996 Penalties.

"(a) Adulterated Butter—(1) False Branding; Sale, Packing, or Stamping in Violation of Law. Every person who knowingly sells or offers for sale, or delivers or offers to deliver any adulterated butter in any form than in new, wooden or paper packages as described in subsection (c) of section 993, or who packs in any package any adulterated butter in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law, shall be fined for each offense not more than $1,000 and be imprisoned not more than two years.

"(2) Omission or Removal of Label. Every manufacturer of adulterated butter who neglects to affix the label required under paragraph (1) of subsection (b) of section 992 to any package containing adulterated butter made by him, or sold or offered for sale for or by him, and every person who removes any such label so affixed from any such package shall be fined $50 for each package in respect to which such offense is committed.

"(b) Failure of Wholesale Dealers to Keep or Permit Inspection of Books, or to Render Returns. Any person who willfully violates any of the provisions of section 994 shall for each such offense be fined not less than $50 and not exceeding $500, and be imprisoned not less than thirty days nor more than six months.

"(c) Failure to Comply with Provisions Relating to the Manufacture, Storage, and Marking of Process or Renovated Butter. Any person, firm or corporation violating any of the provisions of section 995 shall be deemed guilty

of a misdemeanor and on conviction thereof shall be punished by a fine of not less than $50 nor more than $500 or by imprisonment not less than one month nor more than six months, or by both said punishments, in the discretion of the court."

**Pertinent Sections Meat Inspection Laws.**

United States Code Annotated, Title 21, Sections 72-79.

72. Post mortem examination of carcasses and marking or labeling; destruction of carcasses condemned; reinspection. For the purpose hereinbefore set forth the Secretary of Agriculture shall cause to be made by inspectors appointed for that purpose a post mortem examination and inspection of the carcasses and parts thereof of all cattle, sheep, swine, and goats to be prepared for human consumption at any slaughtering, meat canning, salting, packing rendering, or similar establishment in any State, Territory, or the District of Columbia for transportation or sale as articles of interstate or foreign commerce; and the carcasses and parts thereof of all such animals found to be sound, healthful, wholesome, and fit for human food shall be marked, stamped, tagged, or labeled as "Inspected and passed"; and said inspectors shall label mark stamp or tax as "Inspected and condemned" all carcasses and parts thereof of animals found to be unsound, unhealthful, unwholesome, or otherwise unfit for human food; and all carcasses and parts thereof thus inspected and condemned shall be destroyed for food purposes by the said establishment in the presence of an inspector, and the Secretary of Agriculture may remove inspectors from any such establishment which fails to so destroy any such condemned carcass or part thereof, and said inspectors, after said first inspection, shall, when they deem it necessary, reinspect said carcasses or parts thereof to determine whether since the first inspection the same have become unsound, unhealthful, unwholesome, or in any way unfit for human food, and if any carcass or any part thereof shall, upon examination and inspection subsequent to the first examination and inspection, be found to be unsound, unhealthful, unwholesome, or

otherwise unfit for human food, it shall be destroyed for food purposes by the said establishment in the presence of an inspector, and the Secretary of Agriculture may remove inspectors from any establishment which fails to so destroy any such condemned carcass or part thereof.

73. Examination of carcasses brought into slaughtering or packing establishments, and of meat food products issued from and returned thereto. The foregoing provisions shall apply to all carcasses or parts of carcasses of cattle, sheep, swine, and goats, or the meat or meat products thereof which may be brought into any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, and such examination and inspection shall be had before the said carcasses or parts thereof shall be allowed to enter into any department wherein the same are to be treated and prepared for meat food products; and the foregoing provisions shall also apply to all such products, which, after having been issued from any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, shall be returned to the same or to any similar establishment where such inspection is maintained.

74. Inspectors of meat food products; marks of inspection; destruction of condemned products; products for export. For the purpose hereinbefore set forth the Secretary of Agriculture shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of all meat food products prepared for interstate or foreign commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, and for the purposes of any examination and inspection said inspectors shall have access at all times, by day or night, whether the establishment be operated or not, to every part of said establishment; and said inspectors shall mark, stamp, tag, or label as "Inspected and passed" all such products found to be sound, healthful, and wholesome, and which contain no dyes, chemicals, preservatives, or ingredients which render such meat, or meat food products unsound, unhealthful, unwholesome, or unfit for human food; and said inspectors shall label, mark, stamp, or tag as "Inspected and

condemned" all such products found unsound, unhealthful, and unwholesome, or which contain dyes, chemicals preservatives, or ingredients which render such meat or meat food products unsound, unhealthful, unwholesome, or unfit for human food, and all such condemned meat food products shall be destroyed for food purposes, as hereinbefore provided, and the Secretary of Agriculture may remove inspectors from any establishment which fails to so destroy such condemned meat food products: Provided, That subject to the rules and regulations of the Secretary of Agriculture the provisions of this section in regard to preservatives shall not apply to meat food products for export to any foreign country and which are prepared or packed according to the specifications or directions of the foreign purchaser, when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is to be exported; but if said article shall be in fact sold or offered for sale for domestic use or consumption then this proviso shall not exempt said article from the operation of all the other provisions of sections 71 to 94 inclusive, of this title.

75. Labeling receptacles or coverings of meat or meat food products inspected and passed; supervision by inspectors; sales under false names; trade names. When any meat or meat food product prepared for interstate or foreign commerce which has been inspected as hereinbefore provided and marked "Inspected and passed" shall be placed or packed in any can, pot, tin, canvas, or other receptacle or covering in any establishment where inspection under the provisions of sections 71 to 94, inclusive, of this title is maintained, the person, firm, or corporation preparing said product shall cause a label to be attached to said can, pot, tin, canvas, or other receptacle or covering, under the supervision of an inspector, which label shall state that the contents thereof have been "inspected and passed" under the provisions of such sections; and no inspection and examination of meat or meat food products deposited or inclosed in cans, tins, pots, canvas, or other receptable or covering in any establishment where inspection under the provisions of such sections is maintained shall be deemed to

be complete until such meat or meat food products have been sealed or inclosed in said can, tin, pot, canvas, or other receptacle or covering under the supervision of an inspector, and no such meat or meat food products shall be sold or offered for sale by any person, firm or corporation in interstate or foreign commerce under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted.

76. Sanitary inspection and regulation of slaughtering and packing establishments; rejection of meat or meat food products unfit for food. The Secretary of Agriculture shall cause to be made, by experts in sanitation or by other competent inspectors, such inspection of all slaughtering, meat canning, salting, packing, rendering, or similar establishments in which cattle, sheep, swine, and goats are slaughtered and the meat and meat food products thereof are prepared for interstate or foreign commerce as may be necessary to inform himself concerning the sanitary conditions of the same, and to prescribe the rules and regulations of sanitation under which such establishments shall be maintained; and where the sanitary conditions of any such establishment are such that the meat or meat food products are rendered unclean, unsound, unhealthful, unwholesome, or otherwise unfit for human food, he shall refuse to allow said meat or meat food products to be labeled, marked, stamped, or tagged as "inspected and passed".

77. Examination of cattle and food products thereof, slaughtered and prepared during nighttime. The Secretary of Agriculture shall cause an examination and inspection of all cattle, sheep, swine, and goats, and the food products thereof, slaughtered and prepared in the establishments hereinbefore described for the purposes of interstate or foreign commerce to be made during the nighttime as well as during the daytime when the slaughtering of said cattle, sheep, swine, and goats, or the preparation of said food products is conducted during the nighttime.

78. Transportation of carcasses, meat, or meat food products not properly inspected and marked. No person, firm, or corporation shall transport or offer for transportation, and no carrier of interstate or foreign commerce shall transport or receive for transportation from one State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to any place under the jurisdiction of the United States, or to any foreign country, any carcasses or parts thereof, meat, or meat food products thereof which have not been inspected, examined, and marked as "Inspected and passed," in accordance with the terms of sections 71 to 94, inclusive, of this title, and with the rules and regulations prescribed by the Secretary of Agriculture.

79. Forgery, alteration or unauthorized use of marks, labels, or other identification devices or certificates. No person, firm, or corporation, or officer, agent, or employee thereof, shall forge, counterfeit, simulate, or falsely represent, or shall without proper authority use, fail to sue, or detach, or shall knowingly or wrongfully alter, defact, or destroy, or fail to deface or destroy, any of the marks, stamps, tags, labels, or other identification devices provided for in section 71 to 94, inclusive, of this title, or in and as directed by the rules and regulations prescribed hereunder by the Secretary of Agriculture on any carcasses, parts of carcasses, or the food product, or containers thereof, subject to the provisions of such sections or any certificate in relation thereto, authorized or required by such sections or by the said rules and regulations of the Secretary of Agriculture.

1. Object of section. The plain object of this section is to safeguard the food products in question against alteration or substitution, and thus enable the officials of the government to systematize and render effective the process of inspection; an object that is interfered with if the tags or other identification devices are destroyed, whether they be destroyed by those engaged in the business or by others. U. S. *v.* Lewis (Kan. 1914), 235 U. S. 282, 35 S. Ct. 44, 59 L. Ed. 229.

2. Unauthorized use of marks or labels.—Shipment of inspected hams from Chicago to Pittsburgh, and wrapping thereof, after being boiled smoked, in paper bearing labels as to inspection held a violation of sections 71 to 94 of this title. Armour & Co. *v.* U. S. (Pa. 1915), 222 F. 233, 138 C. C. A. 63.

3. Application to renovated butter.—Under previous provisions similar to this section, which were made applicable to process or renovated butter, as are sections 71 to 94 of this title, it was held that the removal of stamps and caution notices attached to original packages of renovated butter, which was the subject of interstate commerce, constituted an offense. U. S. *v.* Green (D. C. N. Y. 1905), 137 F. 179.

4. Act March 3, 1891, 4 (superseded)—See (1895) 21 Op. Atty. Gen. 128 as to false labels.

**Regulations No. 9 of U. S. Treasury Department are printed in full beginning page 27 of record.**

U. S. Treasury Department
Bureau of Internal Revenue

Regulations No. 9

Relating to the

Taxes on Oleomargarine Adulterated Butter and Process or Renovated Butter.

Under the Acts of

August 2, 1886 (24 Stat., 209), May 9, 1902 (32 Stat., 193), August 10, 1912 (37 Stat., 273), October 1, 1918 (40 Stat., 1008), July 10, 1930 (46 Stat., 1022), March 4, 1931 (46 Stat., 1549), and February 24, 1933 (47 Stat., 902).

Revised April, 1936

(d) Deleterious products seizable.—The Secretary of Agriculture will determine whether or not materials being used in the manufacture of process or renovated butter will be deleterious to health or unwholesome in the finished product. If any materials which have been so determined to be deleterious to health or unwholesome in the finished

product are found to be present in any process or renovated butter, intended for, or in course of, exportation or shipment in interstate commerce, such process or renovated butter will be confiscated.

## B. D. I. Order No. 1—Revised

Issued December 24, 1936

UNITED STATES DEPARTMENT OF AGRICULTURE
BUREAU OF DAIRY INDUSTRY

## Regulations for Carrying into Effect the Process or Renovated Butter Act

### Introduction

Under authority conferred upon the Secretary of Agriculture by the act of Congress approved May 9, 1902, entitled "An act to make oleomargarine and other imitation dairy products subject to the laws of any state, or territory, or the District of Columbia, into which they are transported, and to change the tax on oleomargarine, and to impose a tax, provide for the inspection, and regulate the manufacture and sale of certain dairy products, and to amend an act entitled 'An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine approved August 2, 1886' " (32 Stat. 193-197; U. S. C., title 26, sec. 990-997); and by the act of Congress approved August 10, 1912, entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1913" (37 Stat. 273); the following regulations are made and are hereby promulgated, which for purposes of identification are designated B. D. I. Order No. 1—Revised, superseding S. R. A.. 1—Bureau Dairying, issued April, 1925; and B. D. Order 1, issued February 14, 1925; which are hereby revoked.

Henry A. Wallace, Secretary of Agriculture.

Washington, D. C., December 24, 1936.

### Regulation 1.—Short Title of Act

For the purpose of these regulations the act entitled "An act to make oleomargarine and other imitation dairy

products subject to the laws of any State or Territory or the District of Columbia into which they are transported, and to change the tax on oleomargarine and to impose a tax, provide for the inspection, and regulate the manufacture and sale of certain dairy products, and to amend an act entitled 'An Act Defining Butter', also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine approved August 2, 1886", approved May 9, 1902 (32 Stat. 103-199; U. S. C., title 26, sec. 990-997, as amended by the act of August 10, 1912 (37 Stat. 273, U. S. C., title 26, sec. 997 (c), entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1913", shall be known and referred to as the Process or Renovated Butter Act. The Chief of the Bureau of Dairy Industry is charged, under the direction of the Secretary, with the administration of these regulations.

## Regulation 2.—Definitions

For the purpose of these regulations the following words, phrases, names, and terms shall be construed, respectively, to mean:

Section 1. The Meat Inspection Act.—The act of June 30, 1906, entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, nineteen hundred and seven" (34 Stat. 674-679) as reenacted by act of March 4, 1907 (34 Stat. 1260-1265; U. S. C., title 21, secs. 71 to 94), entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, nineteen hundred and eight", the sanitary provisions of which are made applicable to renovated-butter factories by act of Aug. 10, 1912 (37 Stat. 273; U. S. C., titles 26, sec. 997 (c), entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1913."

Sec. 2. Department.—The United States Department of Agriculture.

Sec. 3. Bureau.—The Bureau of Dairy Industry of the United States Department of Agriculture.

Sec. 4. Chief of Bureau.—The administrative head of the Bureau of Dairy Industry of the United States Department of Agriculture.

Sec. 5. Inspector.—Any Department officer or employee authorized to perform any duties in connection with the administration of these regulations.

Sec. 6. Person.—Natural persons, individuals, firms, partnerships, corporations, companies, societies, and associations, and agent, broker, officer, employee, or member thereof. This term shall import both the plural and the singular as the case may be.

Sec. 7. Butter.—The food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter.

Sec. 8. Par. 1. Process or renovated butter.—Butter which has been subjected to any process by which it is melted, clarified, or refined and made to resemble genuine butter, always excepting adulterated butter as defined in section 4 of the act of May 9, 1902 (32 Stat. 195).

Par. 2. Process or renovated butter must contain at least 80 per cent by weight of milk fat.

Par. 3. The term "process butter" and "renovated butter" are used synonymously and it is immaterial whether a manufacturer designates the product "process butter" or "renovated butter."

## Regulation 3.—Sanitation and Sanitary Inspection of Process or Renovated Butter Factories

Section 1. For the purpose of effectively administering the Process or Renovated Butter Act, rigid sanitary inspections will be made at such times and as often as necessary of all process or renovated butter factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market.

Sec. 2. Inspectors shall have access at all times by day or night to every part of any process or renovated butter factory or storehouse.

* * * * * * *

## Regulation 4.—Sanitation and Sanitary Inspection of Products of and Material From Which Process or Renovated Butter is Manufactured

Section 1. "Rigid" sanitary inspections will also be made of the character and condition of the materials going into the manufacture of process or renovated butter and of the quantity and quality of process or renovated butter manufactured.

Sec. 2. Due care must be taken to prevent process or renovated butter, in any stage of its manufacture, from falling on the floor, and in the event of its having so fallen, the soiled portion shall not be used. Butterfat collected from floors, drains, or catch basins shall not be used in the manufacture of process or renovated butter.

Sec. 3. Only good clean, and wholesome water and ice shall be used in the preparation and manufacture of process or renovated butter and, whenever there is any doubt regarding the purity of the water supply, the facts shall be reported to the Chief of Bureau.

Sec. 4. Air used in blowing or aerating the oil during the process of manufacture shall be pure and clean, and shall be taken from the outside of the building; and in order to prevent the use of air which is contaminated with dust, smoke, objectionable odors, etc., some approved method of purification, such as washing or filtering through cotton, shall be provided.

Sec. 5. In manufacturing process or renovated butter all cream, milk or skim milk used must be pasteurized.

Sec. 6. All milk, skim milk, dried milk, dried skim milk, cream, and analogous substances used in the making of process or renovated butter shall be kept, stored, and handled in a sanitary manner in accordance with accepted dairy practices.

Sec. 7. All other materials including salt and butter color entering into the manufacture of process or renovated butter shall also be kept, stored, and handled in a sanitary manner.

Sec. 8. All cartons, parchment wrappers, liners, packages, tubs, cans, tins, or other containers used for packing process or renovated butter shall be stored, kept, and handled in a sanitary manner.

### Regulation 5.—The Marking, Labeling and Branding of Process or Renovated Butter

Section 1. (a) Before removal from the factory each package of process or renovated butter shall have legibly printed or stenciled on one of its sides the legend "Process Butter" or "Renovated Butter"; also the factory number, district, and State, and the net weight, in the following manner:

Process Butter
Factory No. 2, 2d Dist. New York
Net Weight, 60 lbs.

Sec. 9. Inspectors of the Department of Agriculture, appointed for the purpose by the Secretary of Agriculture, are authorized to enter all factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market for the purpose of examination or inspection authorized by this act.

Sec. 10. Periodic inspection of each factory shall be made by such inspectors who will submit a complete report to the Chief of Bureau on the sanitation of the premises, the character and condition of the materials used, and the quantity and quality of process or renovated butter produced. The sanitary provisions of the Meat Inspection Act shall apply to the sanitary inspection of process or renovated butter factories. (See act of Aug. 10, 1912 (37 Stat., 273).)

Sec. 11. Process or renovated butter containing any filthy, decomposed, or putrid animal or vegetable substance shall be deemed adulterated under the Foods and Drugs Act.

Sec. 12. The Secretary of Agriculture will determine whether or not materials being used in the manufacture of process or renovated butter will be deleterious to health or

unwholesome in the finished product. If any materials which have been so determined to be deliterious to health or unwholesome in the finished product are found to be present in any process or renovated butter, intended for, or in course of, exportation or shipment in interstate commerce, such process or renovated butter will be confiscated, as provided for in regulation 7, section 4 hereof.

Sec. 13. Original packages of process or renovated butter for export shall be stamped and branded as in the case of packages for domestic use and may be covered with cloth, jute or burlap. The outer covering shall be conspicuously stenciled with the legend "Process Butter" or "Renovated Butter", in boldface gothic letters not less than an inch square, and the words "For Export Only" on the line beneath, in similar letters not less than three-eighths of an inch square.

Sec. 14. Process or renovated butter for export shall be examined by inspectors of the Department of Agriculture, who will issue a certificate as to its purity, quality, and grade and the sufficiency of the stamps and brands. If inspection is not made before the outer coverings are placed upon the packages, the exporter may be required to remove them.

(The foregoing secs. 1 to 14, have been promulgated by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury and the Secretary of Agriculture.)

### Regulation 6.—Reports.

Section 1. Each process or renovated butter factory shall furnish to authorized inspectors accurate information as to all matters required in making their reports.

### Regulation 7.—Process or Renovated Butter Intended for or in the Course of Interstate Commerce or for Export.

Section 1. To determine whether or not materials used in the manufacture of process or renovated butter are deleterious to health or unwholesome in the finished product, a sample of such butter shall be taken.

Sec. 2. Such sample shall be drawn in the following manner: A sample will be taken from every package of each lot. However, (A) if a lot includes two or more packages from one churning, a sample may be taken from one package only; or (B) if the separate churnings are not indicated, not less than one sample from each 10 tubs may be taken. Additional samples may be taken if, in the opinion of the inspector, such action is necessary to obtain representative samples of such butter.

Sec. 3. The samples thus obtained, properly identified, shall be promptly forwarded to the Department for examination and chemical analysis.

Sec. 4. If such butter is found upon such examination and such chemical analysis to be deleterious to health or unwholesome, and such butter is intended for exportation or shipment into other States, or is the course of exportation, or in the course of such shipment, the Secretary shall confiscate the same to prevent its use for food purposes. The Secretary may release such butter to its owner for industrial use, upon such conditions as he deems necessary to prevent its use for food purposes.

Sec. 5. Any butter suspected of being process or renovated, or adulterated, wherever found will be sampled as herein provided. The samples thus obtained, properly identified, shall be promptly forwarded to the Department for examination and chemical analysis, together with a statement outlining the circumstances of the collection of sample.

Sec. 6. All process or renovated butter intended for exportation or in the course of exportation must be marked as provided in these regulations.

**Sections of Alabama Agricultural Code of 1927.**

37. Possession: Sale and Delivery of Prohibited Articles. —No person within this State shall manufacture for sale therein, have in possession with intent to sell, offer or expose for sale, sell, or deliver any article of food or drugs which is adulterated or misbranded within the meaning of this Article.

38. Definition of Words and Terms.—The word "article" when referring to food or drugs, is used in the broad and comprehensive sense and has reference to the food product or the drug product in question. The term "food" as used herein shall include all articles of food, drink, confectionery, or condiment, whether simple, mixed or compound, used or intended for use by man or domestic animals. The term "drug" as used herein shall include all medicines and preparations recognized in the U. S. Pharmacopoeia or National Formulary for internal or external use and any substance of mixture of substances to be used for the cure, mitigation or prevention of disease in man or domestic animals. The words "standard of purity or quality" herein used shall refer to and include the standards of purity for food products promulgated by the State Board of Agriculture and statutes of this State.

39. Adulteration of Food.—An article shall be deemed adulterated in the case of food: First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength. Second. If any substance has been substituted wholly or in part for the article. Third. If any valuable constituent of the article has been wholly or in part abstracted. Fourth. If it be mixed, colored, powdered, coated, stained, or otherwise treated in a manner whereby damage or inferiority is concealed, or in a manner whereby the appearance of said Article is improved; provided this shall not apply to the precoloring or processing of fruits where such precoloring or processing does not conceal damage or inferiority. Fifth. If it contains any poisonous or deleterious ingredient which may render such article injurious to health; Provided, that when in the preparation of food products for shipment they are preserved by an external application applied in such a manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering of the package, the provisions of this Article shall be construed as applying only when said products are ready for consumption. Sixth. If it consist in whole or in part of a filthy, decomposed, or putrid animal

or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter. Seventh. If in the course of its preparation of manufacture an ingredient of inferior food value has been substituted in whole or in part for an ingredient of greater food value. Eighth. If it does not conform to the standard of purity or quality established for the article.

71. Renovated Butter:—No person shall sell in this State any butter that is produced by taking original packing stock butter, or other butter, or both, and melting the same so that the butter fat can be drawn off or extracted, then mixing the said butter fat with skimmed milk, or milk, or cream, or other milk product, and re-churning or re-working the said mixture, or that produced by any process that is commonly known as boiled, process or renovated butter, unless the words "renovated butter" shall be plainly branded with Gothic or bold faced letters at least three-fourths of an inch in height on the top and sides of each tub, or box, or pail, or other kind of case, or package, or on the wrapper of prints or rolls in which it is put up. If such butter is exposed for sale uncovered or not in a case or package, a placard containing the labels so printed shall be attached to the mass of butter in such manner as to easily be seen and read by the purchaser. The branding or marking of all packages shall be in the English language, and in a conspicuous place so as to be easily seen and read by the purchaser.

72. Commissioner Charged with Enforcement,—The Commissioner and his duly authorized agents shall be charged with the proper enforcement of all the provisions of this Article.

Section 217. As Amended. That Section 217 of Article Twenty-three of the 'Agricultural Code of Alabama,' of 1927, be and the same is hereby amended so as to read as follows: Section 217. Suspension of Sale of Article.—If at any time the Commissioner or his duly authorized agent, shall have reason to believe that any product or products or article mentioned in the succeeding sections of this Arti-

cle, which are held in possession, delivered, kept, offered or exposed for sale in this State, do not comply with the requirements of this Article or other Article of this Code as to ingredients, substance, analysis, marking or labelling, weight or measure of the same, it shall be his duty by written order to suspend the sale of the same until he shall have satisfied himself, or shall be satisfied by an analysis, or otherwise, that such product or article is made up, compounded or marked as required by law and rules and regulations under authority of law.' If he shall find that the same does not comply with such laws and rules and regulations, either before or after the making of such suspension order, then he is authorized to proceed with regard to the same as provided in the succeeding Sections of this Article, or he may order in writing the same to be held at his disposition pending the placing of such product or article in such condition as will meet the requirements of such laws, rules and regulation, under the supervision and direction of the Commissioner or his duly authorized agent, or at the discretion of the Commissioner proceeding with regards to the same as provided in the succeeding Sections of this Article. Provided in case the owner of such product or article denies by written notice to the Commissioner or his agent that the same is not in compliance with the laws, rules or regulations and requests a hearing thereon, the Commissioner or his agent shall as soon as practicable thereafter proceed as provided in the succeeding Sections of this Article, in order that the Court may hear and decide said issue and proceed as provided for in the succeeding Sections of this Article. Any person who moves, transports, sells or in any other manner disposes of any product or article after such product has been ordered suspended or held as hereinbefore provided shall be guilty of a misdemeanor and upon conviction thereof fined not more than Five Hundred ($500.00) Dollars or imprisoned for not more than six months or both, provided that such product or article may be moved, transported or otherwise disposed of by and in compliance with written order by the Commissioner.

Sec. 3 pp. 1103 and 1104 of the Acts of 1935.

218. Proceeding to Condemn Seized Article.—Any fertilizer, fertilizer material, ground limestone, paint, white lead, linseed oil, turpentine, kerosene or other illuminating oils, gasoline, benzine or other liquid motor fuels, insecticides and fungicides, commercial feeds, agricultural seeds, eggs, vinegar, sausage, milk, cream, ice cream or other dairy products, imitation butter and cheese, or any article of food or drug which is adulterated misbranded or under standard, grade, weight or measure claimed within the meaning of any provision of this Code, and which is manufactured for sale, held in possession with intent to sell, offered or exposed for sale, or sold or delivered within this State, shall be liable to be proceeded against in the Circuit Court of the County where the same is found and seized for confiscation by writ of attachment for condemnation. Such writ shall issue upon the sworn complaint of the Commissioner or his duly authorized agent, taken by an officer authorized to administer an oath to the effect that such articles or product is adulterated or misbranded or is under standard, grade, weight or measure claimed, as the case may be within the meaning of this Article. The said sworn complaint by said Commissioner or his duly authorized agent, may be amended at any stage of the proceedings. Said writ shall be returnable in five days to the Court issuing the writ; such Court shall hear and decide whether the allegations of the complaint are true and whether said article or product shall be condemned and confiscated. Such hearing shall not be had until five days' notice of the date therefor shall have been served on the owner, his agent, or any other party having an interest in the same, except in case defined in subhead (a). Service of a copy of the writ of attachment showing the returns of the attaching officer shall be sufficient notice for the purposes of this Section. Such writ may be executed by the Commissioner, his duly authorized agent, or by any sheriff or constable in the State. Upon the seizure of the article or product described in the affidavit, it shall be the duty of the officer or person executing the writ to return same to the Circuit Court, with his return thereon, and within five days after its return, the Court shall make up an issue between the State as Plaintiff and the property seized as defendant. (a) In the event that

the owner or his agent cannot be found in this State, then said service may be perfected by posting a copy of the writ in a conspicuous place upon the premises where the goods were found and seized, and by mailing a copy thereof by registered mail to the owner, or his agent, to his last known address, and this shall be deemed to be sufficient service of the notice required by this Section. If upon the return day of such writ of attachment, the owner of the article or product, his agent or other party having an interest in same thus notified fails to appear and show cause why said goods should not be condemned, judgment of condemnation and confiscation shall, upon such default, be rendered by the Court on the basis of said complaint. If such owner or agent or other party having an interest in such article or product shall on or before the return day of the writ of attachment, or upon such other day as the Court upon application of such party may determine, shall file an answer upon oath denying the allegations of adulteration, misbranding, or under standard, grade, weight or measure, as the case may be, in said complaint, the issue thus raised may be determined by the Court after hearing all the evidence offered by or in behalf of all the parties to the proceedings. Any such party may demand a jury trial of any issue of fact to be determined in the proceedings instituted hereunder, and in case a jury trial is demanded, the judgment rendered by the Court shall be in accordance with the facts as found by such jury; provided, however, that the verdict of the jury may be set aside by the Court where manifestly contrary to the evidence of law. If a judgment of condemnation and confiscation is rendered against such article or product as being adulterated, misbranded, or under standard, grade, weight or measure, within the meaning of this Article, the same shall be disposed of by destruction or sale, as the Court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Agricultural Fund, but such goods shall not be sold contrary to the provisions of this Article; provided, however, that upon the payment of the costs of such attachment proceedings and the execution and delivery of a good and sufficient bond to the effect that such article shall not be sold or otherwise disposed of contrary to the provisions

of this Article, the Court may be ordered direct that such article or product shall be delivered to the owner thereof.

219. Report of Violations to Solicitor. If it shall appear from examination or analysis of fertilizer, fertilizer material, ground limestone, paint, white lead, linseed oil, turpentine, kerosene or other illuminating oils, gasoline, benzene or other liquid motor fuels, insecticides and fungicides, commercial feeds, agricultural seed, eggs, vinegar, sausage, milk, cream, ice cream or other dairy products, imitation butter and cheese, or any articles of food or drugs that any of the provisions of this Article have been violated, the Commissioner shall certify or cause to be certified the facts to the county or State solicitor, with a copy of the results of the analysis or examination, and said county or State solicitor upon receipt of this information shall cause appropriate proceedings to be instituted in the proper Court, for the imposition of fines and penalties herein provided.

FILE COPY

RECEIVED
FEB 21 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. ~~784~~ 28

CLOVERLEAF BUTTER COMPANY, A CORPORATION,
*Petitioner,*

*vs.*

HAYGOOD PATTERSON AS COMMISSIONER OF AGRICULTURE & INDUSTRIES OF THE STATE OF ALABAMA, AND GEORGE H. MARSH, AS DIRECTOR OF THE DIVISION OF AGRICULTURAL CHEMISTRY IN THE DEPARTMENT OF AGRICULTURE & INDUSTRIES OF THE STATE OF ALABAMA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

# BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

HORACE C. WILKINSON,
ERLE PETTUS,
VICTOR H. SMITH,
*Counsel for Petitioner.*

# INDEX.

## Subject Index.


| | Page |
|---|---|
| Points of Law | 1 |
| Point A | 2 |
| Point B | 2 |
| Point C | 3 |
| Point D | 4 |
| Argument | 4 |
| I. Important question of federal law which should be settled by the United States Supreme Court | 4 |
| Purity of finished product not an issue | 7 |
| The claim that pure, wholesome food cannot be manufactured from unclean raw material is unsound | 9 |
| The Government authorizes renovation of unclean butter | 12 |
| Alabama rule unfairly discriminates against Alabama industry | 15 |
| II. The Circuit Court of Appeals' decision is in conflict with applicable decisions of this Court | 16 |
| Congress has preempted the field | 16 |
| Regulations relating to raw material and finished product are comprehensive | 17 |
| The Meat Inspection Act | 24 |
| The rule announced by the Circuit Court of Appeals destroys the small farmer's only dependable market for country butter | 24 |
| The effect of the Federal law is to exclude State action | 25 |
| Conflict in State and Federal standards not necessary | 30 |
| Purpose of Renovated Butter Act is to protect public health | 30 |
| The compliance-defiance test is incompatible with the paramount power of Congress over interstate commerce | 38 |

Page.

III. The Circuit Court of Appeals erroneously failed to follow the construction placed on the Alabama Agricultural Code by the Supreme Court of Alabama in State v. Cecil, 216 Ala. 391 ..... 43

Conclusion ..... 47

## Table of Cases Cited.

*Adams Express Co.* v. *Croninger*, 226 U. S. 491 ..... 2

*9 Barrels of Butter* case, 241 Fed. 499 ..... 8

*Charleston & W. C. R. R. Co.* v. *Varnville Furniture Co.*, 237 U. S. 597 ..... 2

*Chicago Board of Trade* v. *Olsen*, 262 U. S. 1 ..... 3

*C. R. I. & P. Co.* v. *Hardwick Co.*, 226 U. S. 426 ..... 2

*Currin* v. *Wallace*, 306 U. S. 1 ..... 3

*Dahnke-Wallace Milling Co.* v. *Bondurant*, 257 U. S. 282 ..... 3

*Erie R. R. Co.* v. *New York*, 233 U. S. 671 ..... 2

*Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64 ..... 4

*Erie R. R. Co.* v. *Winfield*, 244 U. S. 170 ..... 2

*Farmers Grain Co.* v. *Langer*, 273 Fed. 635 ..... 29

*Foster Fountain Pkg. Co.* v. *Hayden*, 278 U. S. 1 ..... 46

*Grandin Farmers Coop. Elevator Co.* v. *Langer*, 282 U. S. 605 ..... 3

*Hall* v. *DeCuir*, 95 U. S. 485 ..... 25

*Hines* v. *Davidowitz*, 61 Sup. Ct. Rep. 399 ..... 2

*Kelly* v. *Washington*, 302 U. S. 1 ..... 33

*L. & N. R. R. Co.* v. *State*, 16 Ala. App. 199 ..... 2

*Lemke* v. *Farmers Grain Co.*, 258 U. S. 50 ..... 4

*Minnesota Rate* cases, 230 U. S. 352 ..... 45

*Mintz* v. *Baldwin*, 289 U. S. 346 ..... 31

*Missouri Pac. R. R. Co.* v. *Porter*, 273 U. S. 341 ..... 3

*Missouri Pac. R. R. Co.* v. *Stroud*, 267 U. S. 404 ..... 2

*Napier* v. *Atlantic Coast Line R. R. Co.*, 272 U. S. 606

*New York Central R. R.* v. *Winfield*, 244 U. S. 147 ..... 2

*Northern Pacific R. R.* v. *Washington*, 222 U. S. 370 ..... 2

*Oregon-Washington R. R. Co.* v. *Washington*, 270 U. S. 87 ..... 2

*Pacific States* v. *White*, 296 U. S. 176 ..... 32

*Prigg* v. *Pennsylvania*, 16 Peters 539 ..... 3

Page

*Rhodes* v. *State of Iowa*, 170 U. S. 412 ..... 15
*Second Employers Liability* cases, 223 U. S. 1 ..... 45
*Shaffers* v. *Farmers Grain Co.*, 268 U. S. 190 ..... 4
*Sinnot* v. *Davenport*, 63 U. S. 227 ..... 42
*South Carolina Highway Dept.* v. *Barnwell*, 303 U. S. 177 ..... 34
*Southern R. Co.* v. *Railroad Commission*, 236 U. S. 439 ..... 2
*Southern R. R. Co.* v. *Reid*, 222 U. S. 424 ..... 23
*Stafford* v. *Wallace*, 258 U. S. 495 ..... 3
*State* v. *Cecil*, 216 Ala. 391 ..... 4
*Townsend* v. *Yeomans*, 301 U. S. 441 ..... 35
*United States* v. *Bohl*, 125 Fed. 625 ..... 3
*United States* v. *Darby Lbr. Co.*, 61 Sup. Ct. 451 ..... 3

STATUTES CITED.

Act of May 9, 1902, Chapter 784, 32 Stat. 193, as amended, Title 26, U. S. C. A., Int. Rev. Code, Chap. 16, Secs. 2320-2327 ..... 1
Alabama Agricultural Code, Sec. 37 ..... 43
Alabama Agricultural Code, Sec. 71 ..... 7
Alabama Agricultural Code, Sec. 217 ..... 43
Alabama Agricultural Code, Sec. 218 ..... 43
Carmack Amendment, 49 U. S. C. A. 20 ..... 23
Employers Liability Act, 45 U. S. C. A. 51-58 ..... 23
Hours of Service Act, 45 U. S. C. A. 61-66 ..... 23
Internal Revenue Code, Sec. 2322 ..... 17
Internal Revenue Code, Sec. 2325 ..... 16
Locomotive Boiler Inspection Act, 45 U. S. C. A. 22-34 ..... 23
Missouri Revised Statutes (1919), Sections 9985, 9990
Quarantine Act, Sec. 8 of the Act of Aug. 20, 1912, as amended by Agricultural Appropriation Act of Mar. 4, 1917 ..... 23
Renovated Butter Act, Fed. Stat. Ann. Vol. 3, p. 127 ..... 14
26 U. S. C. A. Section 995 ..... 11
Wilson Bill, 26 Stat. 313, Chap. 728 ..... 15

TEXT CITED.

15 C. J. S. Sec. 13, p. 270 ..... 26

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1940**

---

# No. 781

---

CLOVERLEAF BUTTER COMPANY, A CORPORATION,
*Petitioner,*

*vs.*

HAYGOOD PATTERSON AS COMMISSIONER OF AGRICULTURE & INDUSTRIES OF THE STATE OF ALABAMA, AND GEORGE H. MARSH, AS DIRECTOR OF THE DIVISION OF AGRICULTURAL CHEMISTRY IN THE DEPARTMENT OF AGRICULTURE & INDUSTRIES OF THE STATE OF ALABAMA.

---

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

---

### Points of Law.

#### Point A.

The decision of the Circuit Court of Appeals involved the construction of the Renovated Butter Act, which is an important question of Federal law which has not been, but should be settled by this Court.

Act, May 9, 1902, Chapter 784, 32 Stat. 193, as amended, Title 26, U. S. C. A. Int. Rev. Code, Chap. 16, Secs. 2320, 2321, 2322, 2323, 2324, 2325, 2326 and 2327.

## Point B.

The Court of Appeals decided an important question of Federal law very probably in conflict with applicable decisions of this Court.

(1) The Renovated Butter Act specifically requires the United States Secretary of Agriculture to cause a rigid sanitary inspection to be made of packing stock butter and to determine whether or not raw materials used in its manufacture are unwholesome or deleterious to health in the finished product.

Section 2325 I. R. C.

(2) Federal legislation specifically requiring the United States Secretary of Agriculture to inspect packing stock butter in interstate commerce excludes like action by State officers.

*Hines* v. *Davidowitz* (MMS) 61 Sup. Ct. Rep. 399;
*Oregon-Wash. R. R. Co.* v. *Wash.*, 270 U. S. 87;
*Napier* v. *Atl. Coast Line R. R. Co.*, 272 U. S. 606;
*Northern Pacific R. R.* v. *Wash.*, 222 U. S. 370;
*Sou. R. R.* v. *Reid*, 222 U. S. 424;
*Missouri-Pacific R. R.* v. *Stroud*, 267 U. S. 404;
*L. & N. R. R. Co.* v. *State*, 16 Ala. App. 199;
*C. R. I. & P. Co.* v. *Hardwick Co.*, 226 U. S. 426;
*Adams Express Co.* v. *Croninger*, 226 U. S. 491;
*Erie R. R.* v. *New York*, 233 U. S. 671;
*New York Central R. R.* v. *Winfield*, 244 U. S. 147;
*Erie R. R. Co.* v. *Winfield*, 244 U. S. 170;
*Charleston & W. C. R. R. Co.* v. *Varnville Furniture Co.*, 237 U. S. 597.

(3) The main purpose of the Renovated Butter Act was to provide for the sanitary inspection of such butter and

place of manufacture in order to eliminate all butter injurious to the health of the consumer.

*U. S.* v. *Bohl*, 125 Fed. 625.

(4) Packing stock butter is in stream of interstate commerce from the time it is purchased until it is manufactured into the finished product and delivered to the consignee.

*Currin* v. *Wallace*, 306 U. S. 1;
*Dahnke-Wallace Milling Co.* v. *Bondurant*, 257 U. S. 282;
*Stafford* v. *Wallace*, 258 U. S. 495;
*Chicago Board of Trade* v. *Olsan*, 262 U. S. 1.

(5) The effect of the Renovated Butter Act is to exclude State regulation of packing stock butter in interstate commerce without any express prohibition in the Federal legislation of State action, Congress having preempted and completely occupied the field with respect to that subject matter.

*Prigg* v. *Pennsylvania*, 16 Peters 539;
*Oregon Wash. R. R.* v. *Wash.*, 270 U. S. 87;
*Napier* v. *Atlantic Coast Line*, 272 U. S. 606;
*Erie R. R.* v. *New York*, 233 U. S. 671;
*N. Y. C. R. R.* v. *Winfield*, 244 U. S. 147;
*Erie R. R.* v. *Winfield*, 244 U. S. 170;
*C. R. I. & P. R. R.* v. *Hardwick Co.*, 226 U. S. 426;
*Mo. Pac. Co.* v. *Porter*, 273 U. S. 341.

**Point C.**

Where interstate and intrastate operations are necessarily indivisible and interstate operations are dominant the business must be considered as engaged in interstate commerce.

*U. S.* v. *Darby Lbr. Co.*, 61 Sup. Ct. 451;
*Grandin Farmers Coop. Elevator Co.* v. *Langer*, 292 U. S. 605, affirming 5 Fed. Supp. 425;

*Shaffers* v. *Farmers Grain Co.*, 268 U. S. 190;
*Lemke* v. *Farmers Grain Co.*, 258 U. S. 50;
*Currin* v. *Wallace*, 306 U. S. 1.

**Point D.**

The Circuit Court of Appeals construed the Alabama Agricultural Code of 1927 contrary to the construction placed on that State Statute by the highest Court in the State.

*State* v. *Cecil*, 216 Ala. 391.

(1) The Circuit Court of Appeals should have followed the construction placed on the State Statute by the highest court in the State.

*Erie R. R.* v. *Tompkins*, 304 U. S. 64.

May it please the Court:

I.

**The construction of the Renovated Butter Act is an important question of Federal law which has not been, but should be settled by this Court.**

The Renovated Butter Act was enacted by Congress in 1902. It is found in the Act of May, 1902, Chapter 784, 32 Stat. 193, as amended, Title 26 U. S. C. A. Int. Rev. Code Sections 2320-2327, inclusive.

*It is a special enactment relating to this particular industry.*

It was adopted to remedy conditions existing at the time fully recognized by Congress as shown by testimony and discussions before the Committees and debates on the floors of both Houses. Congressional Record 57th Congress H. B. 9206, pages 1303, 1352, 1353, 1595, 1624, 1625, 1630, 1658. (Appendix 46, 47, 177, 178, 3241, 3242, 3271,

3272, 3277, 3278, 3279, 3282, 3283, 3316, 3317, 3321, 3454, 3549, 4586, 4587.) Senate Committee on Agriculture & Forestry Hearings February 17, 1902, 4, 5, 6, 7, 8, 9, 49, 50, 51, 52, 53.

The attention of Congress was directed particularly to the need of sanitary inspection and regulation of the industry and the materials entering into the manufactured product as well as the methods employed.

Prior to the passage of the 1902 Act, renovated butter plants were numerous—each a law unto itself as to sanitation. Naturally, there were many abuses, but notwithstanding, process butter and the raw material out of which it was made have always been recognized as legitimate articles of commerce. The Renovated Butter Industry supplies a market for country butter and also offers a wholesome product to the consumer cheaper than creamery butter.

To meet this situation; to provide and enforce rigid sanitary regulations; and to prevent deception, the Renovated Butter Act was passed in 1902, after much discussion and consideration and frequent amendments by Congress. Congress had already enacted laws covering the meat industry, packing plants, etc., in interstate commerce in great detail. The original renovated butter act refers to and adopts all of the applicable sanitary provisions of the then existing Meat Inspection Act. The last amendment of the Renovated Butter Act (August 18, 1912) extends all of the sanitary provisions and regulations of the later Meat Inspection Act to process or renovated butter factories.

By the original special enactment Congress fully took over and occupied the entire field in interstate commerce insofar as the manufacture and sale of renovated butter is concerned, and by the 1912 amendment referred to showed

its purpose and intention to completely and to continually occupy that field in interstate commerce.

The enforcement of these laws and the adoption of regulations to that end was and is committed to the United States Secretary of Agriculture and the Commissioner of Internal Revenue, and regulations have been promulgated from time to time providing, among other things, the complete inspection, regulation and control of the entire industry; including the raw materials used in the manufacture and the proper labeling of the finished product in interstate commerce.

As a matter of history, and as a practical proposition, only those plants that have been willing and able to meet the rigid Federal inspection and regulation have survived.

The plants that have stood the test, now operating in various States, have built a large business in interstate commerce—each operating under a Federal license and under the uniform laws of the United States, and the regulations which have been adopted by the Secretary of Agriculture and the Commissioner of Internal Revenue, having the force and effect of law, and applying alike to each plant engaged in the business. Under these laws and regulations each plant, together with the raw materials used in the manufacture, and also the finished product is made the subject of uniform inspection by the agents of the Secretary of Agriculture.

The record in this case shows that petitioner has built a large business in its 20 years operation, and is unable to supply the demand for its finished product.

The Alabama Statutes, under which the State officers claim authority to do the acts complained of, have been in existence since 1923. The practical construction given these Statutes by the State Department and the predecessors in office of the respondents was that their operation

was confined to intrastate commerce which is in harmony with a holding to the same effect by the highest court of the State in the case of *State* v. *Cecil,* 216 Ala. 391, decided April 7, 1927.

The Statutes of the State of Alabama recognize packing stock butter as the basis of the finished product. Alabama Agricultural Code, Sec. 71 (R. p. 17).

There are three matters of sweeping importance involved in this case:

1. The scope and effect of the Renovated Butter Act and the regulations promulgated pursuant thereto.

2. Whether or not, in order to exclude State regulation of the same article, Congress *must prohibit* State regulation of packing stock butter in interstate commerce for manufacture into process butter for sale and shipment in interstate commerce, where it affirmatively appears by Federal Statute that Congress has fully regulated the identical article in interstate commerce and provided an authority for determining its compliance or non-compliance with the Federal requirements.

3. Whether or not it is permissible for State officers to exercise jurisdiction at the same time over the identical subject matter, viz, packing stock butter in interstate commerce, over which Congress has already exercised its constitutional authority.

The purity of the finished product was not and could not be made an issue in this case, because the petitioner concedes the right of the State and its officers to proceed against any finished product *offered or kept for sale in Alabama,* but denies the right of respondents to seize or interfere with the raw material in interstate commerce, used in the manufacture of the finished product.

When it comes to interstate commerce, some authority must have the final word as to whether country or packing stock butter can be transported in interstate commerce for manufacture into renovated butter for sale and shipment in interstate commerce. The Constitution has committed this power to Congress.

Congress has exercised its authority and expressly authorized the renovation of such butter and its movement in interstate commerce. Congress has authorized the movement in interstate commerce of the finished product, as long as the United States Secretary of Agriculture determined that the finished product contains nothing unwholesome or deleterious to health.

The trouble petitioner complains of is this: While, by agreement, there is no difference in the standards prescribed by the State and the Federal Government, inasmuch as the State accepts the Federal standard, there is a marked difference in the way the officials of the two governments attempt to determine whether the standard of a wholesome, finished product has been met. Even if the methods were identical we would insist that the article in interstate commerce could not be subjected to duplicate and double inspection. Different methods are as objectionable and injurious as different standards.

If the State has the right to require the raw material out of which renovated butter is manufactured to be as pure and wholesome as the finished product, there is no need of renovation of the raw material.

The United States District Court recognizes that the most objectionable kind of packing stock butter may be renovated.

In the *9 Barrels of Butter case*, 241 Fed. 499, raw butter containing a substantial quantity of dirt, feathers, paper, aniline dyes, the excrement of rats, cheesey particles and a

substantial volume of rancid butter, was ordered renovated by the United States District Court.

The record in this case does not enable us to make a comparison of the butter seized by the respondents, with the butter involved in the *9 Barrels of Butter case*, but it is almost impossible to conceive of any butter being worse than the butter ordered renovated by the Federal District Court in that case.

The question of whether or not a State may prevent the production, within its borders, of impure food is not involved in this case.

Raw country butter or packing stock butter *is not a food* but raw material out of which a food is manufactured. The respondents have not seized the raw material because it is acquired, held, or offered, or exposed for sale *as food*, but they have seized the raw material because they claim the right to prevent, by seizure, the renovation of raw butter moving in interstate commerce, although the Renovated Butter Act, as construed by the Federal court, authorizes the renovation of such material. Such action necessarily sets aside the Act of Congress regulating renovated butter, and overturns the rule recognized by the Federal District Court in the case referred to.

Impure food is not a legitimate article of trade or commerce, but raw material, which contains impurities which can be manufactured into a pure and wholesome article of food by eliminating the impurities, is a legitimate article of commerce. Many examples might be cited such as copra, which is sun dried cocoanut in its filthiest and most objectionable form, out of which many edible oils and salad dressings are made.

Congress *has not prohibited* the movement of packing stock butter in interstate commerce for manufacture into pure and wholesome process butter for sale and shipment in interstate commerce. *Congress has prohibited the move-*

*ment of deleterious or unwholesome process butter in interstate commerce.* In the matter of renovated butter, Congress has regulated the raw material, the finished product, and its manufacture from beginning to end.

We concede the right of every State to inspect and seize any finished product offered for sale in its jurisdiction, which contains anything deleterious to health. We also concede the right of the Secretary of Agriculture of the United States *to inspect* raw butter in interstate commerce.

The main purpose of the Renovated Butter Act was:

> "To provide for the sanitary inspection of such butter at the place of manufacture, and to take every precaution in order that none shall be shipped from the factory which, can, in any way, be injurious to the health of the consumer."
>
> *U. S.* v. *Bohl*, 125 Fed. 625.

When Congress imposed the duty on the Secretary of Agriculture of the United States to inspect the raw material in interstate commerce it excluded State inspection and seizure as long as the raw material is in interstate commerce. We insist that State officers have no right or authority to seize raw material, in interstate commerce, *in advance of its renovation*, and by seizure and confiscation prevent it being renovated and manufactured into a desirable commodity.

The authority of the Federal Government to inspect the materials used in the manufacture of butter can hardly be questioned. It may inspect the materials *before* or *after* manufacture. If the State may exercise the same authority over the identical subject matter, who would decide the issue in case of conflict?

The United States Secretary of Agriculture may do any one of several things if, upon inspection, the raw material is deemed objectionable. He may (1) set it aside and put the burden on the manufacturer of going to court and ob-

taining a court order for its renovation. (2) He may file a libel against it and condemn it if it is unfit for renovation. (3) He may order it separately renovated, and analyze and examine the finished product, and condemn it, if it contains any deleterious or unwholesome matter.

Whether he does any or all of them he must ascertain the condition of the finished product,

> "and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States or in course of exportation or shipment, he shall have power to confiscate the same."
>
> Section 995, U. S. C. A., Title 26.

Any danger to the public is in the finished product. The United States Secretary of Agriculture is required to remove that danger by confiscating any finished product containing anything unwholesome or deleterious to health.

The majority opinion of the Circuit Court of Appeals recognizes the right of the Federal Government under the Renovated Butter Act to inspect packing stock butter in interstate commerce. But, it holds, in effect, that the State may do the same thing, because it says, Congress *has not prohibited* State regulation, and the Federal Government has not seized the article in question.

The majority plants its opinion on the proposition that the State may seize packing stock butter moving in interstate commerce, until Congress prohibits State regulation or until the Federal Government inspects and passes the article involved.

Our form of Government does not contemplate a twilight zone where a race between the State and Federal officials will result in the sovereignty which gets there "fust with the mostes men" ousting the other sovereignty. It does not contemplate a race between State and Federal officials

in order to see which one may exclude the other from jurisdiction over subject matter in interstate commerce. State inspection of raw material in interstate commerce is excluded by Federal Legislation providing Federal inspection of the same material. *Both are not needed.*

It seems to us that it is unnecessary to cite authority to support the proposition that the respondents are imposing an intolerable burden on interstate commerce by seizing raw material in interstate commerce before delivery to its destination, thereby interfering with the continuity of the shipment and also seizing raw material after its delivery but in the course of manufacture into process butter for sale or shipment in interstate commerce.

Certainly Congress has authorized the United States Secretary of Agriculture to inspect the raw material *in interstate commerce* and to determine the wholesomeness and purity of the finished product *in interstate commerce.* There is no warrant for respondents usurping his authority or undertaking to perform his duty.

There is another reason why the Renovated Butter Act should be construed as showing on its face that Congress preempted the field as to raw material in interstate commerce for manufacture of process butter for sale and shipment in interstate commerce.

In Section 1 of the Renovated Butter Act Congress made the finished product subject to the laws of a State whenever the finished product is introduced into the State for use, consumption, sale or storage therein.

Congress, however, did not make raw material moving in interstate commerce for manufacture into process butter subject to State laws. As long as the raw material is in the stream or channel of interstate commerce it is under Federal and not State jurisdiction. The Circuit Court of Appeals took cognizance of the fact that Congress did not in terms make packing stock butter in interstate commerce

subject to State laws. But the majority claim in effect that the expressed intention of Congress to make the finished product subject to State laws on arrival in the State is evidence of an unexpressed Congressional intent to make the raw material *in interstate commerce* subject to State law upon its arrival in the State.

There are numerous reasons why Congress might exempt the raw material in interstate commerce from the operation of State law, and subject the finished product to the operation of State law when its interstate movement ended and it reached its final destination.

Had Congress intended to subject the raw material in interstate commerce to the operation of State laws it would have said so, as it did in the case of the finished product and not left the court in a state of doubt and uncertainty as to its purpose.

When Congress required the Secretary of Agriculture to inspect the materials going into the manufacture of process butter it was thoroughly aware that State inspection laws could not operate on the subject which Congress assumed jurisdiction over. The raw material is in the stream of interstate commerce from the time it is purchased until it is manufactured into the finished product.

*Currin* v. *Wallace*, 306 U. S. 1;

*Dahnke-Wallace Milling Co.* v. *Bondurant*, 257 U. S. 282;

*Stafford* v. *Wallace*, 258 U. S. 495;

*Chicago Board of Trade* v. *Olsan*, 262 U. S. 1.

It was entirely unnecessary for Congress to subject raw material in interstate commerce to the operation of State law. The process of manufacture from the time the raw material is acquired through its conversion into the finished product and delivery to final destination is in interstate

commerce. The interests of the State are abundantly taken care of when the finished product is made subject to the operation of State law when its interstate journey is at an end for the obvious reason that the public is not menaced or endangered by the raw material. The condition of the finished product at the time it reaches the consumer determines its danger *vel non* to the public health. It is most unusual for Congress to authorize a State to interrupt the orderly course of interstate commerce when Congress itself has taken the subject in hand. If the finished product is as pure and wholesome as Federal Legislation requires it to be before it can be delivered in interstate commerce there is no danger to the public health from the raw material used in its manufacture.

Congress left it to the several States to take whatever action they might see fit with respect to the finished product after its movement in interstate commerce ceased. Congress had no way of knowing what States might or might not act to restrict the use of the finished product. For that reason Congress made the finished product subject to the operation of State laws leaving each State free to legislate with respect to the finished product. At the same time, Congress had no desire to, or reason for, destroying the renovated butter business and with it the little farmer's most dependable market for raw country butter. Congress, therefore, undertook a regulation of the business by taking over the field of inspection of the raw material in interstate commerce, as well as the examination and inspection of the finished product, and adopted suitable measures, to insure the purity of the finished product and in that way establish a uniform standard throughout the country.

The title of the Renovated Butter Act, Fed. Stat. Ann. Vol. 3, page 127, shows that one of the expressed purposes of the Act was "to regulate the manufacture" of dairy

products. This apparently escaped the attention of the majority of the Circuit Court of Appeals. Even Congressional action making process butter subject to the operation of State law upon its introduction into the State does not authorize the State to interfere with the continuity of an interstate shipment of process butter. Such shipment must proceed until it reaches the consignee.

*Rhodes* v. *State of Iowa*, 170 U. S. 412.

In view of that well-established rule we are unable to discover any basis for a contention that the State may interfere with the continuity of an interstate shipment of raw material. If the State cannot interfere with the continuity of an interstate shipment of finished product which is expressly subjected to the operation of State law as soon as it is delivered to the consignee it is difficult to understand how it can be claimed that the State may interfere with the continuity of an interstate shipment of raw material before it is delivered to the consignee when it has not been expressly subjected to the operation of State law.

The language in Section 1 of the Renovated Butter Act is identical with the terms of the Wilson Bill, 26 Stat. at Large, 313, Chap. 728, construed in the *Rhodes* case, *supra*. The provision making the finished product subject to the operation of State law upon its introduction into the State merely enables the State to avoid the operation of the original package doctrine, after the commodity's transportation is completed.

The majority opinion of the Circuit Court of Appeals leaves the true meaning of the Renovated Butter Act and relating acts in doubt and uncertainty as well as the rights of the petitioner under it, and the authority of the Secretary of Agriculture of the United States in performing the duty imposed on him by Congress.

## II.

**The Court of Appeals decided an important question of Federal law very probably in conflict with applicable decisions of this Court.**

(a) Congress has preempted the field of inspection of raw material in interstate commerce going into the manufacture of process butter for sale and shipment in interstate commerce, and the Circuit Court of Appeals erred in holding otherwise.

The question of whether or not Congress has preempted and completely occupied the field of inspection and regulation of the raw material in interstate commerce going into the manufacture of process butter for sale and shipment in interstate commerce, necessarily calls for a construction of the Acts of Congress known as the Renovated Butter Act. It may be appropriately asked: What has Congress done about this matter? The answer is found in the Federal Statutes and the regulations promulgated by the Secretary of Agriculture of the United States pursuant to the Acts of Congress.

In Section 5 of the Act of 1902, now Section 2325, I. R. C., it is provided:

> "The *Secretary of Agriculture is* authorized and *required to cause a rigid sanitary inspection to be made*, at such times as he may deem proper or necessary, of all factories and storehouses where process or renovated butter is manufactured, packed, * * * and *of all the* products thereof and *materials going into the manufacture of the same* * * *. The Secretary of Agriculture shall make all needful regulations for carrying this section and sections 2326 (c) and 2327 (b) into effect and shall cause to be ascertained and reported from time to time the quantity and quality of process or renovated butter manufactured, and the character and the condition of the material from which

it is made. And he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States or in course of exportation or shipment he shall have power to confiscate the same." (Emphasis supplied.)

In addition to the sweeping and comprehensive power vested in the Secretary of Agriculture by the provision quoted, Section 4 of the original Act, now Section 2322, I. R. C., *requires every manufacturer* of process or renovated butter *to conduct his business under such surveillance of officers and agents as the Commissioner of Internal Revenue, with the approval of the Secretary of Agriculture, may by regulation require.*

Pursuant to the express mandate in Section 2325 I. R. C. the most comprehensive regulations relating to both raw material and finished product have been promulgated by lawful authority. The first regulation is found in Regulation No. 9 issued by the Treasury Department, revised April, 1936. Paragraph (d) of these Regulations reads:

"(d) *Deleterious products seizable.*—The Secretary of Agriculture will determine whether or not *materials being used in the manufacture of process* or renovated *butter* will be deleterious to health or unwholesome *in the finished product.* If any materials which have been so determined to be deleterious to health or unwholesome *in the finished product* are found to be present in any process or renovated butter, intended for, or in course of, exportation or shipment in interstate commerce, such process or renovated butter will be confiscated." (Emphasis supplied.)

The next regulations are found in Order No. 1, Bureau of Dairy Industry, revised December 24, 1936, and pro-

mulgated by the Secretary of Agriculture on that date. These regulations minutely and in detail cover every possible phase of the manufacture of process butter for sale and shipment in interstate commerce. The regulations are set out in the Appendix but we will indulge in a brief review of them at this time:

In Regulation 1 it is provided that the chief of the Bureau of Dairy Industry is charged, under the direction of the Secretary of Agriculture, with the administration of these regulations.

Section 1 of Regulation 3 provides for rigid sanitary inspections as often as necessary of all process or renovated butter factories and storehouses where process or renovated butter is manufactured, packed or prepared for market.

Section 3 requires all such places to be maintained in a sanitary condition.

Section 4 requires them to be suitably lighted, screened and ventilated, supplied with proper and sufficient drainage and kept free from steam and other vapors.

Section 5 requires floors, ceilings, walls, partitions, platforms, stairways, etc., to be kept in a sanitary condition.

Section 6 requires all utensils used in the manufacture of processed butter to be kept in a sanitary condition.

Section 7 requires sanitary pumps, pipes and fittings.

Section 8 requires clean employees and clean outer clothing.

Section 9 prohibits the employment of any person afflicted with a communicable disease in a process or renovated butter factory, and requires a report of any employee suspected of being so affected.

Section 10 requires modern plumbing in compartments completely separated from the compartments in which process or renovated butter is prepared, packed, stored or otherwise handled.

Section 11 requires the factory to be kept free from odors, flies and other vermin.

Section 1 of Regulation 4 provides:

> "Rigid sanitary inspections *will also be made of the character and condition of the materials going into the manufacture of processed or renovated butter* and all quantities and qualities of processed or renovated butter manufactured."

Section 2 prohibits the use of any butter that has come in contact with the floor.

Section 3 requires good, clean and wholesome water and ice to be used.

Section 4 requires pure air to be taken from outside the building, which must be filtered.

Section 5 requires cream, milk and skimmed milk to be pasturized.

Sections 6 and 7 require all other materials entering into the manufacture of processed or renovated butter to be kept stored and handled in a sanitary manner, as well as containers used for packing processed or renovated butter.

Regulation No. 5 relates to the labeling and branding of processed or renovated butter.

Regulation No. 6 relates to reports.

Regulation No. 7, Section 1, provides:

> "Section 1. *To determine whether or not materials used in the manufacture of processed* or renovated *butter are deleterious to health or unwholesome in the finished product*, a sample of such processed butter shall be taken.
>
> "Section 2. Such sample shall be drawn in the following manner: A sample will be taken from every package of each lot. However, (A) if a lot includes two or more packages from one churning, a sample may be taken from one package only; or (B) if the separate churnings are not indicated, not less than one sample

from each 10 tubs may be taken. Additional samples may be taken if, in the opinion of the inspector, such action is necessary to obtain representative samples of such butter."

Section 3 provides for the transmission of the samples to the department for examination and chemical analysis.

Section 4 provides for the confiscation of any butter deleterious to health or unwholesome in the finished product, with the provision that the Secretary of Agriculture may release such butter to its owner for industrial use under such conditions as he determines are necessary to prevent its use for food purposes.

That there might be no question as to the plenary authority of the United States Secretary of Agriculture to completely regulate every detail of the manufacture of process butter, including the determination of the suitability of the raw materials employed, which was considered essential to the protection of the public health, Congress extended the sanitary provisions of the meat inspection laws to process or renovated butter factories and again authorized the Secretary to prescribe needful regulations.

For nearly 35 years these meat inspection laws have been considered as evidencing the purpose of Congress to fully occupy and cover that field and to exercise its authority for the insurance of the purity of those finished products to be sold in interstate commerce.

It will be noted that the Regulations for carrying out the Renovated Butter Act as promulgated by the Secretary of Agriculture and the Commissioner of Internal Revenue are predicated upon these laws as well as the original Act of 1902.

There are a number of other provisions in the regulations which are set out in the Appendix, which show how completely Congress has occupied the field of inspection

and regulation, but we do not deem it necessary to set them out at this time.

When the Federal Statutes and regulations are considered, one is naturally confronted with this question: *What more could Congress do than it has done to exclusively occupy the field of inspection and regulation of raw materials in interstate commerce going into the manufacture of process or renovated butter for sale and shipment in interstate commerce; or what may the State of Alabama do in the way of inspection of raw material in interstate commerce going into the manufacture of process or renovated butter for sale and shipment in interstate commerce, that the Secretary of Agriculture is not required to do by the Federal law and the regulations promulgated pursuant thereto which have the force and effect of law?*

If there is anything else that Congress and the Secretary of Agriculture could do in order to preempt and completely occupy the field as to the manufacture of process butter for sale and shipment in interstate commerce, it has not been suggested by the very able Attorney General who represents the Appellees. It has not occurred to us; neither was it mentioned by the Circuit Court of Appeals. The cold, inescapable fact is that there is not a single thing that the State of Alabama can do with reference to packing stock butter in interstate commerce that it is not the duty of the Secretary of Agriculture of the United States to do. The Secretary of Agriculture of the United States has full and complete authority to examine packing stock butter before it is manufactured into renovated butter. He may examine the finished product for the purpose of determining whether the raw material out of which it was manufactured was fit or suitable for that purpose.

The manufacturer is required to conduct his business under such surveillance as the Secretary of Agriculture of the United States may by regulations require. The regu-

lations affirmatively show that Congress has taken possession of the field of regulating and inspecting raw materials in interstate commerce going into the manufacture of process or renovated butter for sale and shipment in interstate commerce. There is no part of the field that the State can occupy without infringing upon the authority vested in the Secretary of Agriculture. There is nothing that the State of Alabama or its officers may do in this field that the Secretary of Agriculture of the United States is not required to do by Federal law and the regulations promulgated pursuant thereto.

First through the Bureau of Animal Industry, but for the past many years, the Secretary of Agriculture, through the Bureau of Dairying, has occupied the field. No State officer in any other State, so far as we have been able to learn, has ever been so bold as to challenge the authority of this well-equipped, highly trained and extremely efficient department, to execute the Renovated Butter Act. Alabama officers, reversing the custom and practice of twenty years, acting under color of their office, have lately entered this field and exercised control and authority over raw materials in interstate commerce. In fact the unchallenged, verified bill shows that the last seizure complained of was a truck loaded with raw butter that was moving in interstate commerce from Georgia to Alabama.

Sections 1 and 2 of Regulation 7 prescribe a method for determining whether or not materials used in the manufacture of process butter are deleterious to health or unwholesome in the finished product.

The respondent state officers are not satisfied with the method prescribed by the regulations promulgated by the Secretary of Agriculture. They are not content to allow the Bureau of Dairying to determine whether or not materials moving in interstate commerce for manufacture into process and renovated butter are deleterious to health

or unwholesome in the finished product. They claim the right in themselves to determine whether raw material in interstate commerce for manufacture into process butter for sale and shipment in interstate commerce, is deleterious or unwholesome.

The least that can be said of it is Congress has certainly occupied the field to the extent of requiring the Secretary of Agriculture to determine the suitability of packing stock butter in interstate commerce going into the manufacture of process butter for sale and shipment in interstate commerce, and the Secretary of Agriculture has prescribed a method for determining whether or not materials used in the manufacture of process butter are deleterious to health or unwholesome.

The Renovated Butter Act and the Regulations promulgated pursuant thereto are certainly not less comprehensive with respect to the subject matter here involved than the Interstate Commerce Commission Act, Employers Liability Act, U. S. C. A., Title 45, Section 51-58, Hours of Service Act, U. S. C. A., Title 45, Section 61-66, Locomotive Boiler Inspection Act, U. S. C. A., Title 45, Section 22-34, The Quarantine Act (Sec. 8 of the Act of Aug. 20, 1912, as amended by Agricultural Appropriation Act of Mar. 4, 1917), Carmack Amendment, U. S. C. A., Title 49, Sec. 20, are with respect to the matter there involved. In each instance those Acts were held to evidence a Congressional intention to take over and completely occupy the field involved.

*Nor. Pac.* v. *Wash.*, 222 Wash. 370 (Hours of Service);

*Napier* v. *Atlantic Coast Line*, 272 U. S. 606 (Boiler Inspection);

*Oregon-Wash. R. R.* v. *Wash.*, 270 U. S. 87 (Quarantine);

*So. Ry.* v. *Reid*, 222 U. S. 424 (Hepburn Act);

*Mo. Pac. R. R.* v. *Stroud*, 267 U. S. 404 (I. C. C. Act);
*L. & N. R. R.* v. *State*, 16 Ala. App. 199 (I. C. C. Act).

These cases require a like result in the construction of the Renovated Butter Act.

THE MEAT INSPECTION ACT.

The fact that Congress, by express words, made the meat inspection act with all of its drastic provisions for aiding government agents in determining the suitability of raw material (cattle, hogs and sheep) as well as the finished product (beef, pork and mutton) applicable to the renovated butter industry, is highly persuasive that Congress intended to preempt the field of inspection of raw material in interstate commerce.

If the respondents are at liberty to seize raw butter in interstate commerce, going into the manufacture of process butter for sale and shipment in interstate commerce, does it not logically follow that they may also seize raw material—cattle, hogs and sheep—in interstate commerce, going into the manufacture of beef, pork and mutton products for sale and shipment in interstate commerce?

The Constitution, by vesting exclusive control in Congress over interstate commerce, exempted a legitimate article of interstate commerce from the burden of two inspections, State and Federal, where the aim, object and purpose of each inspection is the same. Congress intended to completely occupy the field of this subject matter and it has actually occupied it as completely as the English language allows.

THE SMALL FARMER.

The only regular, dependable market the small farmer has for the kind of butter he can produce under the conditions under which he must live is the renovated butter fac-

tory. Big dairies and creameries market butter under a name, and a label that satisfies the consumer of the purity and safety of the product. Oleomargarine, renovated butter and other forms of butter manufactured must be stamped and labeled as the Government requires. The label on it serves the same purpose with the consumer. The public has been educated to purchase butter that carries a label or stamp. The housewife will no longer buy butter that is produced under conditions she knows not what. Unless the little farmer can sell his butter to a renovating plant, where his product is cleaned up, reworked, standardized and labeled as the Federal law requires he is, practically speaking, without a market for his unidentified and unlabeled product.

THE EFFECT OF THE FEDERAL LAW.

In the majority opinion of the Circuit Court of Appeals it is said:

> "They (cases relied on by Appellee) establish the doctrine that state officers enforcing by seizure police regulations with regard to foods, will not be enjoined at the suit of persons complaining of them merely because there exist similar federal laws and regulations in respect to the same subject matter and there has been no federal seizure."

But the opinion does not cite the cases it says establish the alleged doctrine.

As opposed to the novel doctrine that both the State and the United States may exercise jurisdiction at the same time over the same subject matter, we would say as this court has said:

> "Commerce cannot flourish in the midst of such embarrassments."
>
> *Hall* v. *DeCuir*, 95 U. S. 485.

"Insofar as direct regulation of commerce is concerned, the power of Congress is wholly exclusive, and is not divisible into exclusive and non-exclusive parts."
15 C. J. S. Sec. 13, p. 270.

"There is scarcely a detail of regulation which is omitted to secure the purpose to which the Interstate Commerce Act is aimed."

And the same is true of the Renovated Butter Act and the regulations promulgated pursuant to it.

"It is true that words directly inhibitive of the exercise of state authority are not employed, *but the subject is taken possession of.*" (Emphasis supplied.)
*Southern R. Co.* v. *Reid*, 222 U. S. 424-442.

"It is also urged that, even if the Commission has power to prescribe an automatic fire box door and a cab curtain, *it has not done so;* and that *it has made no other requirement inconsistent with the State legislation.* This, also, if true, is without legal significance. *The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power.* (Emphasis supplied.)

* * * * * * *

"If the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it. The Commission's power is ample."

*Napier* v. *Atlantic Coast Line*, 272 U. S. 606.

Apply that case to the case at bar. The power delegated to the Secretary of Agriculture of the United States is a general one. He prescribes the rules and regulations by which the fitness of the raw material is determined. The federal law and the state action are directed to the same subject—renovated butter. The broad scope of the authority conferred on the Secretary of Agriculture of the

United States leads to the conclusion that state legislation is precluded. The fact, if it be a fact, that the secretary of Agriculture has not seen fit to exercise his authority to the full extent has no bearing upon the construction of the renovated butter act. If the protection now afforded by the regulations promulgated by the Secretary of Agriculture of the United States is deemed inadequate, application for relief must be made to him.

It would seem unnecessary to go any further than the *Napier* case. It answers every contention adversely to respondents.

> "It is suggested that the States may act in the absence of any action by the Secretary of Agriculture; that it is left to him to allow the States to quarantine, and that if he does not act there is no invalidity in the state action. Such construction as that can not be given to the federal statute. The obligation to act without respect to the States is put directly upon the Secretary of Agriculture whenever quarantine, in his judgment, is necessary. When he does not act, it must be presumed that it is not necessary. With the federal law in force, state action is illegal and unwarranted."
> *Oregon-Wash. R. R.* v. *Washington*, 270 U. S. 87.

The obligation to act on raw material and finished product in interstate commerce is put directly upon the Secretary of Agriculture. With the Federal law in force, State action is illegal and unwarranted. Congress and the Secretary of Agriculture have decided how deleteriousness or unwholesomeness in raw material, in interstate commerce, going into the manufacture of the finished product for sale and shipment in interstate commerce is to be determined. That excludes any like action by the State.

Our position is supported by *Nor. Pac. Ry.* v. *Washington*, 222 U. S. 370. There Congress passed an "Hours of Service Law," which was to become effective one year after

its passage. During that pre-effective year Washington passed a State "Hours of Service Law." It was claimed the State law might operate during the time Congressional action was not operating.

Chief Justice White, speaking for the Court, said:

> "It is elementary, and such is the doctrine announced by the cases to which the court below referred, that the right of a State to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power. * * * To admit the fundamental principle and yet to reason that because Congress chose to make its prohibitions take effect only after a year, the matter with which Congress dealt remained subject to state power, is to cause the act of Congress to destroy itself; that is, to give effect to the will of Congress as embodied in the postponing provision for the purpose of overriding and rendering ineffective the expression of the will of Congress to bring the subject within its control—a manifestation arising from the mere fact of the enactment of the statute.
>
> * * * * * * *
>
> "But if we pass these considerations and consider the issue before us as one requiring merely an interpretation of the statute, we are of opinion that it becomes manifest that it would cause the statute to destroy itself to give to the clause postponing its operation for one year the meaning which must be affixed to it in order to hold that during the year of postponement State police laws applied."
>
> * * * * * * *

To like effect are:

*L. & N. R. R. Co.* v. *State*, 16 Ala. App. 199, Supreme Court opinion at page 204.

*Prigg* v. *Pa.*, 16 Peters 539.

*Erie R. R.* v. *New York*, 233 U. S. 671.
*N. Y. C. R. R.* v. *Winfield*, 244 U. S. 147.
*Erie R. R.* v. *Winfield*, 244 U. S. 170.
*C. R. I. & P. R. R.* v. *Hardwick Co.*, 226 U. S. 426.
*Mo. Pac. Co.* v. *Porter*, 273 U. S. 341.
*Farmers Grain Co.* v. *Langer*, 273 Fed. 635.

The Circuit Court of Appeals has in effect held that the Secretary of Agriculture has determined that raw material in interstate commerce should not be seized, and that *his determination that it should not be seized*, leaves the *respondents* free to *determine that it should be seized.*

If the Secretary of Agriculture is willing to give the industry an opportunity to clean up packing stock butter in interstate commerce, and to manufacture a wholesome article from it, by what right can that plan for regulation *in interstate* commerce be vetoed by respondents? In *Prigg* v. *The Commonwealth of Pa.*, 16 Pet. 539, it was said:

> "For, if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the State Legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it. * * *"

The record shows, and the opinion of the Court of Appeals recognizes, that the State regulations the respondents claim they are enforcing have exactly the same objective as the Renovated Butter Act and the regulations of the Secretary of Agriculture. Both are trying to accomplish the same thing.

Water we drink is filtered before it reaches us for the express purpose of eliminating all objectionable matter in the water. As long as it is pure it matters but little whether its source is a spring or contaminated stream or pool. The thing that affects health is the condition of the water at the time it is delivered to the consumer.

The Secretary of Agriculture has adopted a practical method for protecting the public health, viz: the condition of the finished product.

There is no rational basis for the contention that the Secretary of Agriculture's failure to seize raw material in interstate commerce leaves State officers free to exercise any authority over the same subject matter.

In the opinion written by Judge Hutcheson of the United States Circuit Court of Appeals for the Fifth Circuit it is said:

> "It is not claimed that the State and Federal standards are in conflict. It is not even claimed that the Federal Government has actually inspected and passed the particular products the State has seized."

That is true. It may be that the raw material was seized by the State officers before the Federal authorities had any opportunity to inspect it. However, that is unimportant. Congress has set a standard for the raw material, and imposed a duty on the United States Secretary of Agriculture to make a "rigid sanitary inspection" of it, thereby excluding State inspection and rendering it unnecessary. If the Secretary of Agriculture decides against seizure of raw material before it is processed, his action is not subject to revision by respondents.

The standard prescribed by Congress and the United States Secretary of Agriculture is that raw material must not be deleterious to health or unwholesome *in the finished product*. The standard fixed by Congress does not reject

raw material deleterious or unwholesome, *in its then condition;* it must not be deleterious or unwholesome *in the finished product.* It is stipulated that the State standard is the same as the standard prescribed by Congress.

We say, therefore, that we have a Federal law completely covering every phase of the manufacture of process butter for sale and shipment in interstate commerce. It covers the raw material; it covers the method of operating the industry; it covers the industry; it covers the finished product; it covers the entire business in the most minute detail.

But, says the Court of Appeals, this is not sufficient to show that Congress has preempted and completely occupied the field. "It must appear that there is in effect an *express prohibition against State regulation,* or that there is such an essential conflict between State and Federal laws and regulations as that compliance with the one is defiance of the other, and therefore *a prohibition against State regulation* must be implied." And the court is apparently of the opinion that its announced conclusion finds support in the case cited on page 232 of the opinion in the Federal Reporter. We insist that the cases cited have been misinterpreted and misapplied.

*Mintz* v. *Baldwin,* 289 U. S. 346.

Suit to restrain State enforcing regulation prohibiting the importation of cattle into New York unless the cattle and the herds from which they came were certified free from Bang's disease by the chief sanitary official of the State of origin.

> "Plaintiff shipped 20 head from Wisconsin for delivery to one Bartlett in New York. The animals were accompanied by a certificate which was sufficient as to them, but there was nothing to show the freedom from Bang's disease of the herd or herds from which they came. For that reason defendant refused to permit

them to be delivered, and so plaintiffs were compelled to take them out of New York." (Page 348.)

"The Federal Department of Agriculture, November 15, 1932, by letter to defendant declared that the *Department had issued no quarantine or regulation pertaining to Bang's disease and that its policy for the present is to leave the control with the various States.*" (Italics supplied.) (Page 349.)

"Whenever any inspector or assistant inspector of the Bureau of Animal Industry shall issue a certificate showing that such officer had inspected any cattle which were about to be shipped * * * from such locality * * * and had found them free from * * * communicable disease, such animals, so inspected and certified, may be shipped, driven, or transported from such place in interstate commerce without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture. * * *" (Pp. 350-351.)

"The express exclusion of State inspection extends only to cases where Federal inspection has been made and certificate issued. The clause cannot be read to extend to other cases. The expression of purpose so to limit the exertion of State power strongly suggests that Congress intended not otherwise to trammel the enforcement of state quarantine measures." (Page 351.)

*Pacific States Co.* v. *White*, 296 U. S. 176:

Suit to enjoin State order prescribing standards for containers in which berries were marketed.

"*The standard prescribed by the order does not conflict with any established by Congress.* The Standard Baskets and Containers Act of May 21, 1928, c. 664, 45 Stat. 685, has no relation to the matter here under consideration. That statute deals solely with hampers, round stave, and splint baskets of capacity not less than one-eighth bushel. The Standard Baskets and Containers Act of August 31, 1916, c. 426, 39 Stat. 673, which in Sec. 2 deals with containers for small fruits and vegetables, prescribes merely the capacity of the

containers. It fixes the cubic feet contents for dry half-pint, pint and quart. It makes no reference to the dimensions or form of the container; and has left to the individual States the adoption of the standards in these respects if deemed necessary." (Page 182-183.)

*Kelly* v. *Washington*, 302 U. S. 1:

"Respondents, owners of motor-driven tugs, sought a writ of prohibition to prevent the enforcement of provisions of c. 200 of the Washington Laws of 1907 (Rem. Rev. Stat., Secs. 9843 et seq.) relating to the inspection and regulation of vessels. (Page 2-3.)

* * * * * * *

"*There is no constitutional rule which compels Congress to occupy the whole field.* Congress may circumscribe its regulation and occupy only a limited field. When it does so, State regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid, if not superseded by Federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together'. (Page 10.)

* * * * * * *

"*In the instant case, in relation to the inspection of the hull and machinery of respondents' tugs, the State law touches that which the Federal laws and regulations have left untouched.* (Page 13.)

* * * * * * *

"We have found that in relation to the inspection of the hull and machinery of these tugs, in order to insure safety and seaworthiness, there is a field in which the State law could operate without coming into conflict with present Federal laws." (Page 15.)

Which very clearly shows that the subject was not completely covered by Federal laws and regulations.

*S. C. Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177:

Suit to enjoin State officers from enforcing State statute limiting weight and width of trucks on public roads while engaged in interstate commerce.

> "Appellees do not challenge here the ruling of the district court that *Congress has not undertaken to regulate the weight and size of motor vehicles in interstate motor traffic*, and has left undisturbed whatever authority in that regard the States have retained under the Constitution. (Page 184.)
>
> "But the present case affords no occasion for saying that the bare possession of power by Congress to regulate the interstate traffic forces the State to conform to standards which Congress might, but has not adopted, or curtails their power to take measures to insure the safety and conservation of their highways which may be applied to like traffic moving intrastate." (Page 187.)

These quotations make it clear that the case turned on the proposition that Congress had not acted on the subject involved.

*Currin* v. *Wallace*, 306 U. S. 1:

Suit to declare Tobacco Inspection Act unconstitutional. It was claimed it was a regulation of intrastate commerce.

> "The Act states its scope and purpose. Sections 1, 2. It applies to transactions involving the sale of tobacco at auction as commonly conducted at auction markets. These transactions are carried on by tobacco producers and by persons engaged in the business of buying and selling tobacco in commerce as defined, that is, in commerce which is interstate or foreign or is with or within the Territories or the District of Columbia. Congress finds that the classification of

tobacco according to type, grade, and other characteristics affects the prices received; that 'without uniform standards of classification and inspection the evaluation of tobacco is susceptible to speculation, manipulation and control,' and 'unreasonable fluctuations in prices and quality discriminations occur,' constituting a burden upon commerce; and that the use of uniform standards is imperative 'for the protection of producers and others engaged in commerce and the public interest therein.' (Page 5-6.)

* * * * * * *

"Under the operation of the Act Federal inspectors examine the tobacco about an hour before the sale. They pull samples from each pile and place tickets indicating the grade. Each day there is displayed in the warehouse a report indicating the average price for the government grades sold on the previous day and weekly reports are issued for the preceding week. (Page 8.)

* * * * * * *

"Inspection and the establishment of standards for commodities has been regarded from colonial days as appropriate to the regulation of trade, and the authority of the States to enact inspection laws is recognized by the Constitution. Art. 1, Sec. 10, par. 2. See Turner *v.* Maryland, 107 U. S. 38, 51-54; Pacific States Co. *v.* White, 296 U. S. 176, 181. *But the inspection laws of a State relating to exports or to articles purchased for shipment to other States are subject to the paramount regulatory power of Congress.*" (Page 12.) (Emphasis supplied.)

This case supports the contention of Appellant. It was there held that the tobacco involved was in interstate commerce and congressional action respecting it was paramount.

*Townsend* v. *Yeomans*, 301 U. S. 454:

Suit to restrain the enforcement of a statute of Georgia fixing maximum charges for handling and selling leaf tobacco.

> "The statute was assailed as an arbitrary and capricious exercise of State power, repugnant to the Fourteenth Amendment of the Federal Constitution, and as placing a direct burden upon interstate commerce in violation of the commerce clause." (Page 443.)
>
> "Unless there is conflict with the authority of the Congress over interstate commerce, the enactment of the statute was clearly within the competency of the Georgia legislature. (Page 449.)
>
> "The main contention of appellants is that the State had no power to enact the regulation as it attempted to govern transactions in the course of interstate and foreign commerce. (Page 452.)
>
> "We find it unnecessary to pass upon the authority of the Congress to regulate the charges of the warehousemen, for we are of the opinion that, if it be assumed that Congress has that authority, *it has not been exercised and in the absence of such exercise the State may impose* the regulation in question for the protection of its people. (Page 452.) (Emphasis supplied.)
>
> "The State is entitled to afford its industry this measure of protection until its requirement is superseded by valid Federal regulation." (Page 459.)

*This case turns on the proposition that Congress had not exercised its authority.*

In this connection we submit it is not necessary for the Federal Government to seize packing stock butter in order to exercise jurisdiction over it. If the Government requires inspection and prescribes a method by which it may be ascertained whether the packing stock butter measures up to a given standard, that, we submit, is as much an exercise of jurisdiction over packing stock butter as is a seizure of the butter itself.

We know of no authority holding that the State may duplicate the work of the Federal Government.

Under the Renovated Butter Act the Secretary of Agriculture is at liberty to examine raw material for the purpose of determining whether it will be deleterious to health or unwholesome in the finished product. He is likewise at liberty to examine the finished product in order to ascertain whether the raw material which went into its manufacture is deleterious to health or unwholesome in the finished product.

In other words, for the purpose of determining whether the raw material in interstate commerce conforms to the standard prescribed by Congress the Secretary of Agriculture may examine the raw material *before* or *after* it is processed. The method by which he ascertains whether there is anything in the finished product that is deleterious to health or unwholesome is left exclusively to him. This indicates that Congress intended to invest him with flexible authority sufficient to meet any situation that might arise. It also indicates that Congress intended to exercise the strictest possible control over renovated butter in interstate commerce. The fact, if it be a fact, that the Secretary of Agriculture has decided that an examination of the finished product is the best method for determining whether or not the raw material that went into its manufacture is deleterious or unwholesome in the finished product, affords neither justification nor excuse for the respondent State officers undertaking *to do* in a *different* way exactly the some thing that the Secretary of Agriculture is required to do by a method which he has approved.

It is not necessary for this Petitioner to show that the Federal Government has actually inspected and passed the particular products the State has seized. It is only necessary for the Petitioner to show that the Federal Govern-

ment has provided for inspecting and passing the particular products the State has seized and directed a particular officer to perform that duty. When it is shown that the Federal Government has prescribed a standard for the products the State has seized and that it has required those products to be inspected for the purpose of determining whether or not they meet the standard prescribed by Congress, State action in the premises is excluded.

It is not a question of whether the Secretary of Agriculture has acted. If the inspection of the raw material in interstate commerce is within the scope of the authority vested in him by the Renovated Butter Act, State action is excluded.

(c) The "compliance-defiance" test, announced in the majority of opinion, is not compatible with the paramount power of Congress over interstate commerce.

A majority of the Circuit Court of Appeals laid down the rule that in order to obtain relief from the enforcement of State police regulations upon the claim that Federal regulations have preempted the field—

> "It must appear that there is in effect an express prohibition against State regulations or that there is such an essential conflict between State and Federal laws and regulations as that compliance with the one is defiance of the other and, therefore, a prohibition against State regulations must be implied."

Let's examine the "compliance-defiance" test. It was rejected in *Erie R. R. Co.* v. *New York*, 233 U. S. 671, *on the ground that it was not compatible with the paramount power of Congress over interstate commerce.* It was there pointed out that the New York Court of Appeals sustained the statute because it found that:

> "The State has simply supplemented the action of the Federal authorities • • • and the form of the

Federal statute * * * fairly seems to have invited and to have left the subject open for supplemental State legislation if necessary."

But, the Supreme Court said:

"It (the Federal statute) admits of no supplement: *it is the prescribed measure* of what is necessary and sufficient for the public safety."

That language applies with peculiar force to the renovated butter statutes and the rigid regulations relating to its manufacture. The condition of the finished product is the prescribed measure of what is necessary and sufficient for the public safety.

Again, in *Southern R. Co.* v. *Railroad Commission,* 236 U. S. 439, it was said:

"If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the State legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. *In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter.* * * *

"When the question is whether a Federal act overrides a State law, the entire scheme of the statute must, of course, be considered, *and that which needs must be implied is of no less force than that which is expressed.* If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—*the State law must yield to the regulation of Congress within the sphere of its delegated power.* Savage v. Jones, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182." (Emphasis supplied.)

In our headlight case, in which compliance with one was not defiance of the other, *L. & N. R. R. Co.* v. *State*, 16 Ala. App. at page 202, it was said:

> "When we come to consider whether or not two powers—one superior and the other of inferior jurisdiction—occupy the same field, it would seem proper that any reasonable doubt, if such there is, should be resolved in favor of the superior jurisdiction."

The "compliance-defiance" test was also rejected in the *Napier* case, 272 U. S. 606 on pages 612-613, where the court said:

> "The argument mainly urged by the States in support of the claim that Congress has not occupied the entire field, is that the Federal and State laws are aimed at distinct and different evils; that the Federal regulation endeavors solely to prevent accidental injury in the operation of trains, whereas the State regulation endeavors to prevent sickness and disease due to excessive and unnecessary exposure; and that whether Congress has entered a field must be determined by the object sought through the legislation, rather than the physical elements affected by it. Did Congress intend that there might still be State regulation of locomotives, if the measure was directed primarily to the promotion of health and comfort and affected safety, if at all, only incidentally?
>
> "The Federal and the State statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the Commission has been exerted only in respect to minor changes or additions. But, this, if true, is not of legal significance. It is also urged that, even if the Commission has power to prescribe an automatic firebox door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the State legislation. This, also, if true, is without legal significance. The fact that the

Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power."

The same test was rejected in *Oregon-Washington R. R. Co.* v. *Washington*, 270 U. S. 87 on pages 101-102, in the following language:

> "The act we are considering is very different. It makes no reference whatever to cooperation with State authorities.
>
> * * * * * * *
>
> "It follows that, pending the existing legislation of Congress as to quarantine of diseased trees and plants in interstate commerce, the statute of Washington on the subject can not be given application. It is suggested that the States may act in the absence of any action by the Secretary of Agriculture; that it is left to him to allow the States to quarantine, and that if he does not act there is no invalidity in the State action. Such construction as that can not be given to the Federal statute. The obligation to act without respect to the States is put directly upon the Secretary of Agriculture whenever quarantine, in his judgment, is necessary. When he does not act, it must be presumed that it is not necessary. With the Federal law in force, State action is illegal and unwarranted."

The "compliance-defiance" test was rejected in *Missouri Pacific R. R. Co.* v. *Stroud*, 267 U. S. 404, which was a suit to recover damages under Sections 9985, 9990, Revised Statutes of Missouri, 1919, which read:

> "'It shall be unlawful for any such common carrier to make or give any undue or unreasonable preference or advantage to any particular person * * * in the transportation of goods * * * or to subject any particular person * * * to any undue or unreasonable prejudice or disadvantage with respect to such transportation * * *' Section 9990, among others things, makes the carrier liable to any person injured by a vio-

lation of the above quoted provision for three times the amount of damages sustained."

Section 3 of the Interstate Commerce Act reads:

> "'That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or for any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.'"

The State statute in effect duplicated the right of action provided by the Federal law.

The court said:

> *"It is elementary and well settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive. * * * The State law has no application to the furnishing of cars to shippers for the transportation of freight in interstate commerce."*
>
> *Missouri Pacific R. R. Co.* v. *Stroud*, 267 U. S. 408.

The "compliance-defiance" test is merely an illustration of extreme cases, in which it is self-evident that a State enactment cannot stand because of its irreconcilable conflict with a Federal law. But there are many instances in which the owner of property in interstate commerce might comply with both regulations—cases in which compliance with one would not be defiance of the other—in which the Supreme Court of the United States has declined to subject the article in interstate commerce to double regulation.

Take the steamboat case, for instance (*Sinnot* v. *Davenport*, 63 U. S. 227): There the owner of the boat might

well have filed the information in the Probate Office at Mobile, as the State law required, as well as with the collectors as the Federal law required. The case, as we understand it, turns on the proposition that Congress had legislated on the "very subject" which the State act undertook to regulate.

The regulation of interstate commerce is so intimately blended and intertwined with responsibilities of the National Government that where it acts, and the State also acts on the same subject, the Act of Congress is supreme and the law of the State, though enacted in the exercise of powers not controverted, must yield to it, and where the Federal Government in the exercise of its superior authority in this field has enacted a complete scheme of regulation and has therein provided a standard for packing stock butter the State cannot conflict or interfere with, curtail or complement Federal law or enforce additional or auxiliary regulations. This contention is supported by the late case of *Hines* v. *Davidowitz*, 61 Sup. Ct. Rep. 399-403, where the rule was applied with reference to legislation affecting aliens. The power of Congress to regulate interstate commerce is certainly as broad as its power to legislate with respect to aliens.

III.

**The Court of Appeals erroneously failed to follow the construction placed on the Alabama Agricultural Code by the Supreme Court of Alabama in State v. Cecil, 216 Ala. 391,** and placed its own construction on the Agricultural Code, contrary to the construction placed on it by the highest court in the State, and in doing so disregarded the rule laid down by this Court in *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64.

With respect to the Alabama Agricultural Code, Sections 37, 217 and 218, we respectfully insist that before the ap-

pellees are authorized by State Statute to seize an article it must appear:

1. That the article seized is an article of food or drugs.

2. It must be adulterated or misbranded.

3. It must be manufactured for sale in Alabama, held in possession with intent to sell in Alabama, offered or exposed for sale in Alabama, or sold or delivered within Alabama. If it is manufactured for sale or held in possession with intent to sell in Alabama, or offered or exposed for sale in Alabama, or sold or delivered within Alabama the Alabama Agricultural Code does not apply. *State* v. *Cecil, supra.*

The Record in this case refutes any claim that the packing stock butter seized in interstate commerce is an article of food. The petitioner's sole purpose in acquiring it and handling it is to work it over, clean it up and render it wholesome and safe, and after that has been accomplished, to sell and ship 90% of it in interstate commerce.

While the interstate character of the butter seized was not challenged below and was taken for granted by the Circuit Court of Appeals, the respondents intimated that they claimed a right to inspect the raw country butter moving in interstate commerce or held and used by the petitioner in interstate commerce or held and used by the petitioner in interstate commerce for the purpose of manufacturing process butter, for sale and shipment in interstate commerce, because it is admitted that 10% of the finished product of petitioner's plant is distributed to consumers in Alabama through retail outlets in the State.

> "Where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation."
>
> *Currin* v. *Wallace*, 306 U. S. 10;
>
> *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50.

The interstate character of the article does not cease until it has become a part of the general mass of property in the State. The fact that the raw butter may be taken from the trucks and stored in petitioner's plant and mixed with other butter acquired in Alabama for manufacture into the finished product for sale and shipment does not take away the interstate character of the raw butter being held for such purpose.

*Stafford* v. *Wallace*, 258 U. S. 495-528;
*Chicago Board of Trade* v. *Olsan*, 262 U. S. 1-43.

We think these authorities show that this Court has ruled that the raw butter does not cease to be in interstate commerce because it lays over in petitioner's plant in Birmingham for a few days awaiting manufacture into a pure and finished product for sale and shipment in interstate commerce. The raw butter is all the while in the channel of interstate commerce. The petitioner's plant in Birmingham, in such circumstances, is merely a conduit through which interstate commerce flows. Where intrastate and interstate transactions are necessarily commingled and are so related that the government of the one involves control of the other it is Congress and not the State that is entitled to prescribe the final and dominant rule.

*Currin* v. *Wallace*, 306 U. S. 1-18;
*Minnesota Rate cases*, 230 U. S. 352;
*Second Employers Liability Cases*, 223 U. S. 1.

Where interstate and intrastate operations are necessarily indivisible, and the interstate operations are the dominant operations, the business must be considered as engaged in interstate commerce.

*U. S.* v. *Darby Lbr. Co.*, 61 Sup. Ct. 451;
*Grandin Farmers Coop. Elevator Co.* v. *Langner*, 292 U. S. 605;

*Shaffers* v. *Farmers Grain Co.*, 268 U. S. 190;
*Lemke* v. *Farmers Grain Co.*, 258 U. S. 50;
*Currin* v. *Wallace*, 306 U. S. 1.

In determining what is interstate commerce the court looks to practical situations and the established course of business.

*Foster Fountain Pkg. Co.* v. *Haydell*, 278 U. S. 1.

There is, therefore, no Alabama Statutory authority for the acts of the appellees complained of.

*State* v. *Cecil*, *supra*.

THE DISSENTING OPINION OF CIRCUIT JUDGE FOSTER:

Attention is respectfully invited to the able dissenting opinion by Circuit Judge Foster concisely stating the issues, and as reasons for his dissent, among other things, saying:

> "The Alabama officers were acting under authority of the Alabama Agricultural Code. In *State* v. *Cecil*, 216 Ala. 391, it was held the enactment of the Agricultural Code was within the exercise of the police power of the State but the operation of the code was confined to intrastate commerce. Conceding that the Alabama regulations are practically the same as the Federal regulations, I consider that Congress has preempted and completely occupied the field as to the manufacture of processed butter for sale and shipment in interstate commerce. The law of Alabama, enforced by State officers, should not be permitted to interfere with the Federal Statute and regulations in respect to shipments in interstate commerce. The bill was dismissed on motion without a trial on the merits. Of course, appellant would have a remedy at law to test the validity of each seizure, but where seizures have been so frequent, and no doubt will continue, if appellant

operates its plant, the remedy at law would not be so complete and adequate as to oust jurisdiction in equity. I consider the judgment of the District Court should be reversed and the case remanded."

## Conclusion.

We have been unable to find, and the opinion of the majority of the Circuit Court of Appeals for the Fifth Circuit does not cite, any authority which holds that a State officer may interfere with the continuity of an interstate shipment and seize a legitimate article of commerce moving in interstate commerce because of a claim that the article does not conform to a standard prescribed by State Statute which the highest court in the State does not apply to interstate commerce.

We have been unable to find, and the opinion of the majority of the Circuit Court of Appeals for the Fifth Circuit does not cite, any authority holding that raw butter in *interstate commerce* going into the manufacture of process butter for sale and shipment *in interstate commerce* may be seized by State officers.

We have been unable to find, and the opinion of the majority of the Circuit Court of Appeals for the Fifth Circuit does not cite, any authority which holds that a decision (either expressed or implied) by the Secretary of Agriculture of the United States not to seize raw material in interstate commerce, but to allow industry an opportunity to clean it up and work it over and convert it into a pure and wholesome finished product may be vetoed, annulled and overruled by State officials, or that the State and the United States may exercise jurisdiction at the same time over the same legitimate article of commerce.

We respectfully submit that the decision and judgment of the Honorable United States Circuit Court of Appeals for

the Fifth Circuit was laid in error and for that reason a writ of certiorari should be granted and the decision reversed and its judgment annulled.

Respectfully submitted,

HORACE C. WILKINSON,
ERLE PETTUS,
VICTOR H. SMITH,
*Counsel for Petitioner.*

(2935)

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1941**

---

# No. 28

---

CLOVERLEAF BUTTER COMPANY, A CORPORATION,
*Petitioner,*

*vs.*

HAYGOOD PATTERSON AS COMMISSIONER OF AGRICULTURE & INDUSTRIES OF THE STATE OF ALABAMA, AND GEORGE H. MARSH, AS DIRECTOR OF THE DIVISION OF AGRICULTURAL CHEMISTRY IN THE DEPARTMENT OF AGRICULTURE & INDUSTRIES OF THE STATE OF ALABAMA.

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

---

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

---

HORACE C. WILKINSON,
ERLE PETTUS,
VICTOR H. SMITH,
*Counsel for Petitioner.*

# INDEX.

## Table of Cases Cited.


| | Page |
|---|---|
| *Bacon* v. *Illinois*, 227 U. S. 504 | 14 |
| *Labor Board* v. *Jones and Laughlin*, 301 U. S. 1 | 15 |
| *Mintz* v. *Baldwin*, 289 U. S. 346 | 18 |
| *Oregon-Washington R. R. Co.* v. *Washington*, 270 U. S. 287 | 20 |
| *Plumley* v. *Massachusetts*, 155 U. S. 461 | 15 |
| *Rhodes* v. *Iowa*, 170 U. S. 412 | 16 |
| *State* v. *Cecil*, 216 Ala. 391 | 23 |
| *United States* v. *Bohl*, 125 Fed. 625 | 6, 11 |
| *United States* v. *F. W. Darby Lumber Co.*, 61 Sup. Ct. Rep. 451 | 15 |


## Statutes Cited.


| | |
|---|---|
| Act of August 2, 1886, chapter 840, 24 Stat. 209 | 6 |
| Act of June 30, 1906, 34 Stat. 676 | 13 |
| 284 | 13 |
| Act of August 10, 1912, chapter 37, Stat 273; Title 26, U. S. C., Section 997(b), (c); Sections 2327 (b) (c) I. R. C. | 13 |
| Agricultural Code of 1923, now Article 25 of the Agricultural Code of 1927 | 23 |

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

---

# No. 28

---

CLOVERLEAF BUTTER COMPANY, A CORPORATION,
*Petitioner,*

*vs.*

HAYGOOD PATTERSON, AS COMMISSIONER OF AGRICULTURE & INDUSTRIES OF THE STATE OF ALABAMA, AND GEORGE H. MARSH, AS DIRECTOR OF THE DIVISION OF AGRICULTURAL CHEMISTRY IN THE DEPARTMENT OF AGRICULTURE & INDUSTRIES OF THE STATE OF ALABAMA.

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

---

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

---

MAY IT PLEASE THE COURT:

The brief of the respondents presents a striking inconsistency. They say this case involves a matter of local concern only. Yet their argument demonstrates beyond question that the case involves a matter of national impor-

tance; particularly is this true at this time when we are facing a situation when every ounce of butter fat that can be converted into an edible product may be desperately needed.

However subtle the argument, the respondent's position is this: they claim the State has the power to prohibit the renovation of butter. They do not say this in so many words, but that is what the argument of learned counsel for the respondents means. It is obliged to mean that. If the State can prohibit the renovation of sub-standard butter, that is the end of the renovated butter business. As a practical proposition the prohibition is as effective as if the State should say: it shall be unlawful for any person to engage in the renovation of butter. Standard butter needs no renovation. The only raw material that can be used in the manufacture of renovated butter is raw country butter. It requires no scientist to understand that all raw country butter is sub-standard in a greater or less degree for one or more of many reasons. Some of it may have too much or too little moisture in it; some of it may have undesirable foreign substance in it; some of it may be too old for human consumption until it is reworked. There is probably not a pound of raw country butter that is not technically "adulterated"—in a greater or lesser degree—according to the statutory definition of "adulteration," yet millions of Americans have reached a ripe old age on a diet that is composed of large quantities of this self-same "adulterated" butter.

That the State may prohibit the possession, sale or delivery of sub-standard butter *as food* is conceded. That it may prohibit its conversion into a useful, desirable food product is quite another question. The public health is not protected by prohibiting the conversion of unfit raw material into a finished product of unquestioned fitness.

A.

Renovation is to butter as pasteurization is to milk. The power of Congress to regulate raw material in interstate commerce from which food for sale and shipment in interstate commerce is manufactured, is as broad and comprehensive as its power to regulate any other article of commerce. The power of Congress is to regulate interstate commerce—all of it—including sub-standard raw butter in interstate commerce.

For more than half a century the renovation of butter has been regarded by the State and Nation as a useful and legitimate business. It is the business of a butter renovator to take a sub-standard product—a product which may be unfit for human consumption in its then condition and to make it fit for human consumption. The renovator of butter renders that which may be unfit to be consumed in its then condition, fit for consumption by subjecting it to a process that renders it pure, wholesome and unobjectionable from a health standpoint, just as the pasteurization plant renders dangerous milk, unfit for human consumption in its then condition, fit for consumption by subjecting it to the process of pasteurization.

The State of Alabama has not prohibited the pasteurization of milk. It has encouraged it. The State of Alabama has not prohibited the renovation of butter. It has encouraged it. The United States has not prohibited the renovation of butter. It has encouraged it. Only the respondents have attempted to advance so far beyond the experience of mankind as to say that butter unfit for human consumption—in its then condition shall not be converted into wholesome food, but must be seized and destroyed.

B.

The claim that Congress has not occupied the field by the Renovated Butter Act.

As we read the opinion of the Circuit Court of Appeals, even that court did not accept that proposition as sound. That court seems to have conceded that Congress has occupied the field (by legislation and the most comprehensive regulations) but the court seems to have attached no importance to Congressional occupation of the field, because,

> "Nothing in the act, the regulations, or the practices under the act, purport to *expressly grant* to plaintiff immunity from state seizure of food products which in the opinion of state officers, are filthy or deleterious in violation of Alabama laws."
>
> 116 Fed. (2d) at page 230.

Briefly stated, the Court of Appeals seems to hold that Congress is in the field, but others may also enter until Congress expressly tells them to stay out. We maintain that complete occupation of the field by Congress excludes all others, without Congress saying anything else about it.

If Congress has not fully and completely occupied the field, it would have been in order for our able friends on the other side, or for the Court of Appeals, to have pointed out the portion of the field unoccupied by Congress as this Court has done in many instances.

1.

The claim that the Renovated Butter Act is not intended as a regulation of commerce.

This claim ignores the title of the Act, a part of which is: "and *to regulate the manufacture* and sale of certain dairy products." It ignores Section 2325 I. R. C. which provides:

> "The Secretary of Agriculture is authorized and required to cause a rigid sanitary inspection to be made, at such times as he may deem proper or necessary, of all factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market, and of the products thereof and materials

going into the manufacture of the same. All process or renovated butter and the packages containing the same shall be marked with words 'Renovated Butter' or 'Process Butter' and by such other marks, labels, or brands and in such manner as may be prescribed by the Secretary of Agriculture, and no process or renovated butter shall be shipped or transported from its place of manufacture into any other State or Territory or the District of Columbia, or to any foreign country, until it has been marked as provided in this section. *The Secretary of Agriculture shall make all needful regulations* for carrying this section and sections 2326 (c) and 2327 (b) into effect *and shall cause to be ascertained* and reported from time to time *the* quantity and *quality of* process or renovated butter manufactured, *and the character and the condition of the material from which it is made.* And he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States or in Court of exportation or shipment he shall have power to confiscate the same." (Emphasis supplied.)

Is a *rigid sanitary inspection* a revenue measure? This claim ignores Regulation 4, Section 1, Regulation 7, Sections 1 and 2 which provide:

"Regulation 4—Sanitation and Sanitary Inspection of Products of and Material From Which Process or Renovated Butter is Manufactured:

"Section 1. 'Rigid' sanitary inspections will also be made of the character and condition of the materials going into the manufacture of process or renovated butter and of the quantity and quality of process or renovated butter manufactured."

* * * * * * *

"Regulation 7—Process or Renovated Butter Intended for or in the Course of Interstate Commerce or for Export

"Section 1. *To determine whether or not materials used in the manufacture of process or renovated butter are deleterious to health* or unwholesome in the finished product, a sample of such butter shall be taken.

"Section 2. Such sample shall be drawn in the following manner: A sample will be taken from every package of each lot. However, (A) if a lot includes two or more packages from one *churning*, a sample may be taken from one package only; or (B) if the separate churnings are not indicated, not less than one sample from each 10 tubs may be taken. Additional samples may be taken if, in the opinion of the inspector, such action is necessary to obtain representative samples of such butter." (Emphasis supplied.)

It ignores *U. S.* v. *Bohl*, 125 Fed. 625.
It ignores the bill's Legislative history.

**Legislative History.**

The Legislative History of the renovated butter act as shown by the records of the 57th Congress at which it was adopted clearly evidences the knowledge of Congress of conditions then existing in that industry and its purpose to provide effective regulation and inspection of the raw materials used and the sanitary conditions under which process or renovated butter is manufactured.

This act had its genesis in legislation relating to oleomargarine. The first Federal action along this line was the Act of August 2, 1886, chapter 840, 24th Statutes 209, which did not touch the subject of process or renovated butter. In the 56th Congress a bill was introduced in the house known as the Grout Bill which undertook to further regulate the oleomargarine industry, but did not mention process or renovated butter. Lengthy hearings were held by the

House Committee on agriculture and that bill passed the House but not the Senate.

The same bill was re-introduced in the House in the succeeding 57th Congress (House Bill 9206) and again referred to its Committee on Agriculture where, after further hearings, a majority reported favorably and a substitute was offered by a minority. Neither report made any references to process or renovated butter.

At that time many process butter factories were being operated throughout the country. Statement was made on the hearing before the Senate Committee February 18, 1902, that there were about 485 renovated butter factories in the country and only about 27 oleomargarine factories—"Senate Hearing on House Bill 9206, Senate Committee on Agriculture", page 24. Both before the House and the Senate Committees in the debates in both Houses frequent references were made to the deplorable conditions of the raw material used to manufacture renovated butter, the manner in which it was gathered, and the unsanitary methods employed in the plants themselves. It was charged that the necessity for effective regulation and inspection of the process or renovated butter was much greater than that of oleomargarine. The opponents of the oleomargarine bill challenged those favoring it to sponsor legislation which would remedy the evils in the process or renovated butter business. (See Congressional Record, 57th Congress, House Bill 9206, pages 1301, 1303, 1352, 1353, 1595, 1624, 1625, 1630, 1658; speech by Mr. Grosvener, appendix pages 46-47; 177-178). While the matter was under discussion in the House, Mr. Allen of Kentucky introduced an amendment to the oleomargarine bill (Congressional Record, page 1352) which provided that the Secretary of Agriculture was authorized and required to cause a rigid sanitary inspection to be made from time to time and at such times as he may deem necessary of all factories and store houses where

butter is renovated; and all butter renovated at such plants shall be carefully inspected in the same manner and to the same extent and purpose as meat products were then inspected, and that the quantity and the quality of butter renovated should be reported monthly; and requiring such butter to be branded or labeled as renovated butter in such manner as the Secretary of Agriculture might prescribe and authorizing the Secretary of Agriculture to make all necessary sanitary and other rules and regulations for carrying that section into effect.

The Allen Amendment did not contain the provisions that the Secretary of Agriculture, "shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome material is found to be used in products intended to be used in exportation or shipment into other states, he shall have power to confiscate the same", as is provided by the law which was finally adopted.

The bill with the Allen Amendment was adopted in the House February 12, 1902 (Congressional Record, page 1658).

In the Senate the bill was referred to its Committee on Agriculture which also conducted hearings. There the opponents again made frequent charges concerning the raw material and conditions pertaining to the process or renovated butter industry and its need for regulation. (Senate Hearings on House Bill 9206, Senate Committee on Agriculture, pages 4, 5, 6, 7, 8, 9, 49, 50, 51, 52, 53). However, the majority report struck the Allen Amendment and reported the bill as it was first introduced in the House. On the floor of the Senate the charges concerning the renovated butter industry were more frequent and fuller. The com-

mittee was criticized for recommending elimination of the Allen Amendment.

Many Senators objected to the passage of the bill without provisions regulating process or renovated butter. Senator Culbertson offered an amendment to the entire bill (Congressional Record, pages 3278-79). In the discussion Senator Lodge stated that he favored the oleomargarine bill but further said: "Whatever may be thought of oleomargarine—I believe in itself it is generally considered an innocuous product. There is no doubt that process butter, renovated butter, is as bad an article as can possibly be devised; and I do not think this bill ought to pass without a suitable provision in regard to renovated butter." It was then stated by Senator Quarrels that an amendment had been offered which provided for that (Record, page 3282).

Senator Proctor then stated, in substance, that the Committee reported in favor of striking out the Allen Amendment for the reason that it was very imperfect and would not accomplish the purpose aimed at and that Senator Harris had offered an amendment fully covering renovated or process butter and adulterated butter (Congressional Record, page 3282).

The Harris Amendment is set out on page 3316 of the Congressional Record. This amendment, though amended in some respects, forms the basis of the present law relating to process or renovated butter. Concerning his amendment, *Senator Harris said:* "* * * *There has been a great deal of complaint made and I think with justice, that the health of the consumer is injured by what is called process or renovated butter. I think the amendment I have offered practically protects in the most efficient way, the interest of the consumer in that direction.*" (Congressional Record, page 3316.) (Emphasis supplied.)

He further referred to the conditions of material and methods of manufacture of oleomargarine prior to the Act of 1886 which he said were checked by that Act and that the bill had been the salvation of that industry and stated:

> "I believe that the regulation which is imposed upon renovated or process butter by the amendment which I have offered will be of equal value to the great dairy interest of this country. They are in danger, I think, of being rendered obnoxious on account of the improper process used by the manufacturers of renovated or process or adulterated butter. *Because it is to protect the purity of the food products of this country I think that this legislation justifiable and proper*" (Congressional Record, page 3317). (Emphasis supplied.)

During the discussion, *Senator Proctor who had charge of the bill stated that the Harris Amendment so far as butter is concerned, is a Pure Food Bill.* (Congressional Record, page 3459).

The Harris Amendment in its final form as adopted by the Senate is set out on page 3607 of the Congressional Record. The bill was passed by the Senate April 3, 1902. Statements concerning the character of the raw material and other conditions in the process or renovated butter industry and the necessity for congressional action for the protection of the public by regulation and inspection as shown by the Congressional Record, were made by: Senator Money, pages 3241-3242; Senator Proctor, page 3242; Senator Stewart, pages 3271-3272; Senator Dolliver, page 3277; Senator Lodge, page 3282; Senator Quarrels, page 3282; Senator Proctor, page 3282; Senator Stewart, pages 3282-3283; Senator Harris, pages 3316-3317; Senators Hatfield, Harris and Money, page 3221; Senator Simmons, page 3454, and Senator Proctor, page 3459.

In explaining changes made by the Senate to the House sitting as a Committee as a whole, Mr. Henry among other

things stated (Congressional Record, page 4586) that the Senate amendment struck out the imperfect House provision for regulating the manufacture of process or renovated butter and substituted a sure and comprehensive law for identification and taxation of the product under supervision of the Treasury Department, and for inspection, sanitary control and regulation under the Department of Agriculture.

In view of the fact that Mr. Henry had at first objected to the incorporation of the Allen Amendment into the House bill, it is significant that after quoting from a statement by Mr. Wells, Dairy Commissioner of Pennsylvania, as to materials used and methods of manufacturing renovated butter he stated, "With these facts before us, who can say that restrictive legislation is unnecessary" (Congressional Record, page 4586).

He further said (Congressional Record, page 4587), "It is anticipated that this legislation will prevent fraud, protect the public from an article of food of unknown or doubtful origin, and insure to the purchasers of butter the pure product of the churn and dairy."

With an unimportant amendment as to the definition of process or renovated butter the House concurred in the Senate Amendment April 3rd, 1902.

In the *Bohl case*, 125 Fed. 625, at p. 626, the Court said:

> *"Other provisions of the (Renovated Butter) Act in question may gain their efficacy from the taxing clause of the Constitution, but Section 5 goes to the commerce clause as the fountain whence its vigor springs."* (Italics supplied.)

The Section 5 referred to by the learned Judge is now codified as Section 2325 of the Internal Revenue Code, which makes it the duty of the Secretary of Agriculture to

determine the suitability of raw material used in the manufacture of renovated butter in the following language:

> "The Secretary of Agriculture shall make all needful regulations for carrying this section and sections 2326(c) and 2327(b) into effect and shall cause to be ascertained and reported from time to time the quantity and quality of process or renovated butter manufactured, and the character and the condition of the material from which it is made. And he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States or in course of exportation or shipment he shall have power to confiscate the same."

The authorities cited and the language employed in the Statute negative the idea that the primary purpose of the Renovated Butter Act was to raise revenue.

The remarks of Senator Spooner quoted in the respondents' brief were merely to show that the rights of the State to control the finished product of oleomargarine, process butter, etc., after its interstate transit was complete was unshackled by the original package doctrine.

The history of the Act above referred to shows how fully and completely Congress intended to occupy the field of complete sanitary regulation and control of both the raw material and the finished product of other butter in interstate commerce.

On page 16 of respondents' brief it is said that:

> "Counsel's intimation that the State is excluded from the field because a tax is paid by petitioner is obviously unsound."

If any intimation of that kind was made we were not conscious of it, and have been unable to find it on subse-

quent examination of our brief. We regard this as a straw man learned counsel erected to be easily destroyed. We make no such claim and argument along that line, and the citation of authority serves no useful purpose in this case.

The legislative history of the Act of August 10, 1912, chapter 284, 37 Statute at Large 273, is also most significant and evidences the continuing purpose of Congress to give full authority to the Secretary of Agriculture to inspect the raw material prior to its being processed, in order to clear up a question which had been raised by the solicitor of the Department of Agriculture as to the authority of the Secretary in that respect.

This act was a part of the Agricultural Department appropriation Act of August 10, 1912, and is codified as Section 997 (b), (c) Title 26, United States Code Annotated. Section 2327 (b) (c) I. R. C. The text of the act being: "That the sanitary provisions for slaughtering, meat canning, or similar establishments as set forth in Act of June 30, 1906, (34 Statutes, page 676) are hereby extended to cover renovated butter factories as defined in the Act of May 9, 1902, under such regulations as the Secretary of Agriculture may prescribe."

This provision was contained in House Bill 18960 as reported by the Committee on Agriculture. In reporting the same the committee made this statement: "It has been found that the department has not sufficiently definite authority to make the desired sanitary inspection in the factories indicated and this language is inserted to give that authority."

When this provision was read to the House sitting as a whole, when a point of order was made by Mr. Mann, Mr. Lamb and Mr. Lever, who had charge of the bill, then made statements to the effect that the committee had gone into the matter carefully, and that there were some fifty renovated butter factories in the United States and while

the department was authorized to inspect their products it had no authority to destroy the butter that was made up into the finished product nor to compel sanitary conditions in factories.

In the statement of the House Conferees as to the concurrence in Senate Amendment it was said:

> "Amendment 46, to which the House agrees, restores to the bill language stricken out upon a point of order on the floor of the House extending to renovated butter factories certain sanitary provisions of the Meat Inspection Act."

The legislative history above referred to shows that the purpose of the amendment was to clarify the law and remove any doubt as to the authority of the Secretary of Agriculture to seize the raw material if it was unfit for conversion into a wholesome finished product. The amendment was advocated by the solicitor of the Department of Agriculture and experts from that department supported it by testimony. The amendment was thrown out on a point of order in the House and restored to the bill in the Senate and it was adopted by a conference committee and approved by the House and Senate.

2.

> "The claim that Congress has specifically indicated its will that raw butter in interstate commerce for manufacture into renovated butter for sale and shipment in interstate commerce may be confiscated by the States."

The contention of the respondents that the petitioner's plant is not a conduit through which the raw butter in interstate commerce flows into the channels of trade in interstate commerce in the form of a finished product, and the quotation from *Bacon* v. *Illinois*, 227 U. S. 504, ignores the record and the stipulation in the record. The respond-

ents fail to point out how the raw material would ever reach the current of interstate commerce in the form of a finished product except through petitioner's plant.

> "Congress was not unaware that most manufacturing businesses shipping their product in interstate commerce make it in their shops without reference to its ultimate destination and then after manufacture select some of it for shipment interstate and some intrastate according to the daily demands of their business, and that it would be practically impossible, without disrupting manufacturing businesses, to restrict the prohibited kind of production to the particular piece of lumber, cloth, furniture or the like which later move in interstate rather than intrastate commerce."
>
> *United States* v. *F. W. Darby Lumber Co.*, 61 Sup. Ct. Rep. 451-459.

The contention made by the respondents that the raw material loses its interstate character because it temporarily comes to rest in the petitioner's plant while being converted into the finished product, for sale and shipment in interstate commerce, was urged and repudiated in *Labor Board* v. *Jones and Laughlin*, 301 U. S. p. 1.

The legislative history of the Renovated Butter Act and the pleadinge in this case show that the petitioner's renovated butter plant is an instrumentality of interstate commerce in much the same way as the actual carriers of interstate commerce. It is a focal point through which the stream of commerce in raw butter sweeps on its way from the producer to the consumer.

*Plumley* v. *Mass.*, 155 U. S. 461, is relied on by the respondents as an authority to support the claim that Congress has specifically indicated its will that raw butter in interstate commerce for manufacture into renovated butter for sale and shipment in interstate commerce may be con-

fiscated by the State. The case, in our judgment, does not remotely support any such contention.

The validity of a State Statute was the primary question before the Court, and an intrastate sale only at retail of a finished product, was involved. No Federal Statute requiring the Secretary of Agriculture of the United States to make an inspection of the raw material and determine its suitability for conversion into the finished product was in existence at that time. Oleomargarine, not renovated butter, was involved. The oleomargarine was artificially colored so as to cause it to look like butter. The basis of the decision was that the State had a right to protect its citizens against fraud perpertrated by artificially coloring an article that was offered for sale at retail within the State. The interstate character of the article was not involved. In such circumstances, this Court could hardly do less than say of legislation of that kind that it was clear that Congress had no purpose to restrict the power of the States over the subject of the manufacture and sale of oleomargarine within their respective limits.

In *In re Rahrer*, Congress spoke, by the Wilson Act, and declared that imported liquors or liquids should, upon arrival in a State, fall within the category of domestic articles of a similar nature. The only question before the Court was whether the law was open to constitutional objection. The Court decided it was not.

And although the Court held the statute has a valid enactment, it decided in *Rhodes* v. *Iowa*, 170 U. S. 412, that the statute notwithstanding, the articles moving in interstate commerce could not be interfered with before its transit was complete.

Neither the *Plumley* nor the *Rahrer* case, nor any other case that we have been able to find, intimates or suggests that Congress has ever indicated that it is willing for any state official to stop a truck concededly moving in inter-

state commerce loaded with raw material for conversion into a finished product for sale and shipment in interstate commerce (R. 15) and to seize such material before its transit is completed. If the officers possess the power to stop a truck thus moving, what is to prevent them from stopping every railroad train carrying the same or any other commodity moving in interstate commerce?

On page 24 of respondents' brief an abbreviated and imperfect reference is made to the caption of the Renovated Butter Act of 1902. Apparently the learned counsel for the respondents, like the Court of Appeals in its majority opinion, selected only a portion of the title and ignored one of its most important provisions, to-wit, the provision in the title asserting that the Act was an Act to Regulate the Manufacture of Certain Dairy Products, including Renovated Butter. The complete title as we find it in 3 Fed. Stat. Ann. vol. 3, page 127, is as follows:

> "An Act to make oleomargarine and other imitation dairy products subject to the laws of any State, or Territory or the District of Columbia into which they are transported, and to change the tax on oleomargarine, and to impose a tax, provide for the inspection, *and regulate the manufacture and sale of certain dairy products*, and to amend an Act entitled 'An Act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine,' approved August second, eighteen hundred and eighty-six." (Italics ours.)

The respondents say that because Congress declared that the finished product shall, upon arrival in a State, fall within the category of domestic articles of similar nature that the Court cannot imply that Congress intended by such an enactment to exclude the State from the regulation of the raw material moving in interstate commerce used in the manufacture of the finished product for sale and

shipment in interstate commerce. The language of the statute renders any such implication unnecessary.

Congress has made it the duty of the Secretary of Agriculture to make a rigid sanitary inspection of the raw material in interstate commerce and to determine its suitability for conversion into the finished product, and to seize and condemn any raw material that contains anything unwholesome or deleterious to health in the finished product. We are not dependent upon any implication. Our rights are based upon the express language of the statute, and there is no suggestion in the enactment that any field of inspection or regulation of the raw material was left open to the State. The only field left open to the State by the enactment was the field reserved to the State by the language employed which made the finished product subject to the laws of the State when offered for sale in the State, which as the Congressional debates show, was an effort on the part of Congress to get rid of the original package doctrine in so far as the finished product is concerned.

3.

**The claim that the Renovated Butter Act does not operate to render inoperative the State's right of action in cases of this kind.**

We agree with our able attorney general that there is a vast disparity of fact and logic in the two lines of cases which he refers to as the "Railroad Cases" and the line of cases headed by *Mintz* v. *Baldwin*, 289 U. S. 346, but we do not agree that his analysis of the difference between the cases is even approximately correct. The fundamental basis of the "Railroad Cases" is not whether the conduct involved operated as an actual barrier and a serious impediment to interstate commerce; the fundamental basis

of the "Railroad Cases" is that Congress had completely occupied the field and there was therefore no part of the field in which the State could operate with respect to the subject matter of the legislation.

The difference between the "Railroad Cases" and the *Mintz* v. *Baldwin* case is striking. In *Mintz* v. *Baldwin* the Government had issued no quarantine or regulation pertaining to Bangs disease and a governmental department official advised the State that it was the policy of the Government to leave the control of Bangs disease with the various States (page 349). Moreover, the legislation itself excluded State inspection only in cases where Federal inspection had been made and a certificate issued by the Federal inspector. That was a provision of the legislation under review. The cattle involved were not inspected by a Federal inspector and no certificate was issued under Federal authority.

The Federal Statute involved in *Mintz* v. *Baldwin* expressly provided that State inspection was excluded only in cases in which a certificate had been issued by the Federal inspector. No certificate having been issued by the Federal inspector, the cattle involved were not under the protection of the Federal law. It is strongly implied in *Mintz* v. *Baldwin* that had a certificate been issued the State could not have interfered.

The Renovated Butter Act does not require the issuance of a certificate. It requires the Secretary of Agriculture to inspect and determine for himself the suitability of the raw material for conversion into the finished product. But, it does not require him to evidence that fact by any formal certificate as was the case in the *Mintz* case, *supra*. In *Mintz* v. *Baldwin*, it was optional with the cattle owner whether he would have his cattle inspected by a Federal inspector and obtain the certificate authorized by law in such cases.

In the case at bar it is not optional with the petitioner as to whether the Secretary of Agriculture will inspect the raw material. The Secretary of Agriculture is required to perform that duty and to make the examination and finding required by statute, and to him is committed the sole responsibility for determining the suitability of the raw material for conversion into renovated butter for sale and shipment in interstate commerce. If it be claimed that any particular lot of raw material seized by the respondents was not actually inspected by the Secretary of Agriculture prior to its seizure, that fact is no evidence that the Secretary of Agriculture would not have inspected the raw material in due time.

The respondents say that the *Mintz* case is to be distinguished from the *Napier* case and like cases because it was stated in the *Mintz* case that:

> "The purpose of Congress to supersede or exclude State action against the ravages of disease is not lightly to be inferred. The intention so to do must definitely and clearly appear."

We have been unable to find any authority intimating that the purpose of Congress to supersede or exclude State action against the ravages of disease must more definitely and clearly appear than the purpose of Congress to supersede or exclude State action against the seizure of a legitimate article of commerce moving in the stream of interstate commerce. It is not so much a question of the purpose of Congress. The makers of the Constitution of the United States had a purpose and that purpose was to exclude the State from the seizure of a legitimate article of commerce moving in the stream of interstate commerce.

The respondents say that the fundamental basis of *Oregon-Washington R. R. Company* v. *Washington*, 270 U. S. 287, is that the statute operated as an actual barrier

and as a serious impediment to interstate commerce. The same thing is true in this case. If the respondents have the authority to stop a truck loaded with raw butter moving in interstate commerce before it reaches petitioner's plant, or to seize raw material in petitioner's plant while being held there for the sole purpose of being converted into renovated butter for sale and shipment in interstate commerce, then the respondents seriously impede interstate commerce and in that way their action is an actual barrier to interstate commerce and imposes an intolerable burden on the same. But the attorney general's analysis of the *Oregon-Washington R. R. Co.* case is incomplete.

The *Oregon-Washington Company* case is based on the proposition that in Section 8 of the Federal legislation there involved it was made the duty of the Secretary of Agriculture to quarantine any State when he shall determine that such quarantine is necessary to prevent the spread of a dangerous plant disease or insect infestation new to or not theretofore widely prevalent or distributed within and throughout the United States, just as it is made the duty of the Secretary of Agriculture in this case to make a rigid sanitary inspection of the raw material and the finished product and to determine the suitability of the raw material for conversion into the finished product. In each case the Secretary of Agriculture is required by Federal legislation to perform a certain duty. The method of performing it is left to his discretion. The State officials in Washington attempted to do the identical thing the Federal legislation required the Secretary of Agriculture to do, and they attempted to justify their action on the theory that they were cooperating with him and that inasmuch as he had not acted in the particular case they were at liberty to proceed.

The court dismissed that specious plea with the comment that the act made no reference whatever to cooperation with State authorities. It proposes the independent exercise of Federal authority with reference to quarantine in interstate commerce. It covers the whole field insofar as the spread of plant disease by interstate transportation can be affected and restrained.

In the case at bar, the Renovated Butter Act makes no reference whatever to cooperation with State authorities. It proposes the independent exercise of Federal authority with reference to the sanitary inspection and regulation of both raw material and the finished product in interstate commerce. It covers the whole field insofar as the inspection of the raw material and the finished product and its manufacture is concerned. With such authority vested in the Secretary of Agriculture and with such duty imposed upon him, the State laws that affect interstate commerce, if there are any such laws, and this Federal law cannot stand together. We respectfully submit that it is impossible to distinguish from the case at bar from the *Oregon-Washington* case.

On page 34 of respondents' brief the bold statement is made that:

> "Congress has indicated no intention to regulate the packing stock butter, as such. No authority is granted to the agents of the Federal Government to seize this packing stock butter if it is found to contain matters that might spread disease and pestilence."

Counsel apparently overlooked Section 2325 of the Internal Revenue Code requiring the Secretary of Agriculture to cause a rigid sanitary inspection to be made of the materials going into the manufacture of raw butter and empowering him to make all needful regulations for carrying out the Renovated Butter Act and investing in him the

power to ascertain whether or not materials used in the manufacture of renovated butter are deleterious to health or unwholesome in the finished product, and expressly providing that in case such deleterious or unwholesome materials are found to be used in the butter *intended* for exportation or shipment to other States he shall have power to confiscate the same.

The counsel also apparently overlooked the broad scope of the Meat Inspection Act which is now applicable to the Renovated Butter Industry. Raw material does not have to reach the stage where it might spread disease and pestilence before it is subject to the condemnation of the Secretary of Agriculture. If the raw material reaches the stage where it is deleterious to health and unwholesome in the finished product it is subject to seizure and liable.

Respondents say that our claim that the real danger to the public is in the finished product is the conclusion of counsel. Our reply is that it is not the conclusion of counsel, it is the conclusion of Congress and the conclusion of the Federal Courts based on an obvious truth.

*State* v. *Cecil*, 216 Ala. 391.

In the brief of the respondents the attorney general says that the Alabama Agricultural Code is not intended to regulate interstate commerce and that if it effects it at all it does so incidentally and within a permitted field, p. 38, 39.

We agree that the Alabama Agricultural Code was not intended to regulate Interstate Commerce. In the *Cecil* case, 216 Ala. 391, the Alabama Supreme Court said that the language employed in Article 23 of the Agricultural Code of 1923, now Article 25 of the Agricultural Code of 1927,

> *"as in other parts of the Agricultural Code was, as we think, intended to confine its operation to intrastate*

*commerce and so avoid conflict with the Federal Constitution."*

We do not agree with the attorney general's assertion that if the Act affects interstate commerce it does so incidentally and within a permitted field. As construed by the respondent it places an intolerable burden on interstate commerce and erects an actual barrier to it after unwarranted invasion of a field occupied by Congress.

This Court is not concerned with any incidental interference with interstate commerce in this case. The interference is direct, immediate, serious and far reaching. *If it be true, as the attorney general states, that the Agricultural Code is not intended to regulate interstate commerce how can it be argued that it confers any authority on the respondents to interfere with that commerce in the way it is conceded the respondents have done and threaten to continue to do as shown by the record.*

## Conclusion.

The argument of the Attorney General demonstrates that the nature and character of the questions involved in this case make it a case in which it is particularly fitting that a writ of certiorari issue to the end that this Court may finally determine and settle those questions that are of vital importance to the renovated butter industry, to the small producer of raw butter, to the great army of consumers and also to those engaged in the tremendous industry known as meat packing business.

Respectfully submitted,

HORACE C. WILKINSON,
ERLE PETTUS,
VICTOR H. SMITH.

**Certificate of Counsel.**

I hereby certify that I have this day forwarded a copy of the foregoing brief and argument to Hon. T. S. Lawson, Attorney General of Alabama, and Hon. William H. Loeb, Assistant Attorney General of Alabama, by registered mail, post paid to their P. O. address in the Department of Justice Building in the City of Montgomery in the State of Alabama.

This the 2nd day of April, 1941.

HORACE C. WILKINSON.

(4716)

FILE COPY

Office Supreme Court U. S.
FILED
OCT 18 1941
CHARLES ELMORE CROPLEY
CLERK

# *Supreme Court of the United States*

**OCTOBER TERM, 1941**

[redacted] 28

CLOVERLEAF BUTTER COMPANY, a Corporation,
*Petitioner-Appellant,*

*vs.*

HAYGOOD PATTERSON as Commissioner of Agriculture & Industries of the State of Alabama, and GEORGE H. MARSH, as Director of the Division of Agricultural Chemistry in the Department of Agriculture & Industries of the State of Alabama.
*Respondents-Appellees.*

## BRIEF AND ARGUMENT FOR PETITIONER

HORACE C. WILKINSON,
ERLE PETTUS,
VICTOR H. SMITH,
*Counsel for Petitioner-Appellant.*

# SUBJECT INDEX


| | Page |
|---|---|
| Statement of the Case | 1 |
| Opinion Below | 3 |
| Specification of Errors to be Urged | 12 |
| Propositions of Law | 13 |
| Argument | 21 |
| Congress has Preempted the Field | 23 |
| Legislative History | 28 |
| Purpose of the Act | 31 |
| State Action Excluded | 41 |
| Cases Cited in Majority Opinion | 52 |
| Conclusion | 70 |


# TABLE OF CASES


| | |
|---|---|
| Adams Express Co. v. Croninger, 226 U. S. 491 | 17 |
| Charleston & W. C. RR. Co. v. Varnville Furniture Co., 237 U. S. 597 | 17 |
| Chicago Board of Trade v. Olsen, 262 U. S. 1 | 15, 51 |
| C. R. I. & P. RR. Co. v. Hardwick Co., 226 U. S. 426 | 16, 47 |
| Currin v. Wallace, 301 U. S. 1 | 15, 20, 51, 52, 58 |
| Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282 | 20 |
| Davis v. Age-Herald Pub. Co., 293 Fed. 591 | 14 |
| Day-Beigwall Co. v. State, 207 N. W. 959 | 19 |
| Erie RR. Co. v. N. Y., 233 U. S. 671 | 16, 47, 62 |
| Erie RR. Co. v. Winfield, 244 U. S. 170 | 16, 47 |
| Farmers Grain Co. v. Langer, 273 Fed. 633 | 16, 18, 47 |
| Foster-Fountain Pkg. Co. v. Haydel, 278 U. S. 1 | 20, 52 |
| General Oil Co. v. Crain, 209 U. S. 212 | 14 |
| Gibbons v. Ogden, 9 Wheaton 1 | 15, 44 |
| Grandin Farmers Co-op. Elevator Co. v. Langer, 292 U. S. 605 | 20, 52 |
| Hall v. DeCuir, 95 U. S. 485 | 42 |
| Hines v. Davidowitz, 61 Sup. Ct. Rep. 399 | 16, 68 |
| Kelly v. Washington, 302 U. S. 1 | 57 |
| Labor Board v. Jones & Laughlin, 301 U. S. 1 | 20, 51 |
| Lemke v. Farmers Grain Co., 258 U. S. 50 | 2, 13, 15, 20, 51, 52 |

## TABLE OF CASES—(Cont.)


| | Page |
|---|---|
| L. & N. RR. Co. v. State, 16 Ala. App. 199 | 16, 19, 47, 63 |
| McDermott v. Wisconsin, 228 U. S. 115 | 18 |
| Mintz v. Baldwin, 289 U. S. 346 | 53 |
| Minnesota Rate Cases, 230 U. S. 352 | 15, 52 |
| Missouri Pacific RR. Co. v. Porter, 273 U. S. 341 | 16, 17, 47 |
| Missouri Pacific RR. Co. v. Stroud, 267 U. S. 404 | 17, 65, 67 |
| Mountain Timber Co. v. Washington, 243 U. S. 219 | 14 |
| Napier v. A. C. L., 272 U. S. 606 | 15, 16, 25, 64 |
| Nat'l Labor Relations Board v. Santa Cruz, etc., Co., 91 Fed. (2d) 790 | 20 |
| Nat'l Labor Relations Board v. Wallace Mfg. Co., 95 Fed. (2d) 818 | 20 |
| N. Y. C. RR. Co. v. Winfield, 244 U. S. 147 | 16, 47 |
| North Pacific RR. Co. v. Washington, 222 U. S. 370 | 16, 20, 46 |
| Oregon-Washington Railroad Co. v. Washington, 270 U. S. 87 | 15, 16, 26, 42, 65 |
| Pacific States Co. v. White, 296 U. S. 176 | 56 |
| Prigg v. Penn., 16 Peters 539 | 16, 47, 48 |
| Reagan v. Farmers Loan & Trust Co., 154 U. S. 362 | 14 |
| Rhodes v. Iowa, 107 U. S. 412 | 20 |
| Second Employers Liability Cases, 223 U. S. 1 | 52 |
| Shafer v. Farmers Grain Co., 268 U. S. 185 | 20, 52 |
| Sinnot v. Davenport, 63 U. S. 227 | 67 |
| Smyth v. Ames, 169 U. S. 466 | 14 |
| Southern Ry. Co. v. Railroad Commission, 236 U. S. 439 | 63 |
| Southern Ry. v. Reed, 222 U. S. 424 | 15, 16, 25, 45 |
| S. C. Highway Dept. v. Barnwell Bros., 303 U. S. 177 | 58 |
| St. L. & S. W. R. Co. v. Arkansas, 235 U. S. 350 | 14 |
| Stafford v. Wallace, 258 U. S. 495 | 15, 51 |
| State v. Cecil, 216 Ala. 391 | 16, 19, 50 |
| State v. Peet, 80 Vt. 449 | 19 |
| Tagg Bros. v. U. S., 280 U. S. 420 | 20 |
| The Fair v. Kohler Die Co., 228 U. S. 22 | 13 |
| Townsend v. Yeomans, 301 U. S. 454 | 60 |
| Truax v. Raich, 239 U. S. 33 | 68 |
| U. S. v. Bohl, 125 Fed. 625 | 37, 69 |

## TABLE OF CASES—(Cont.)


| | Page |
|---|---|
| U. S. v. Darby Lbr. Co., 61 Sup. Ct. 451 | 20, 52 |
| Vicksburg Water Works Co. v. Vicksburg, 185 U. S. 66 | 13 |
| Wilson & Co. v. Nat'l Labor Relations Board, 103 Fed. (2d) 243 | 20 |
| Young & Jones v. Hiawatha Gin & Mfg. Co., 17 Fed. (2d) 193 | 14 |


## STATUTES CITED


| | |
|---|---|
| Internal Revenue Code, Secs. 2320-2327 | Appendix |
| United States Code Annotated, Title 23, Secs. 990-996 | Appendix |
| Alabama Agricultural Code of 1927 | Appendix |

# *Supreme Court of the United States*

**OCTOBER TERM, 1941**

781

CLOVERLEAF BUTTER COMPANY, a Corporation,
*Petitioner-Appellant,*

*vs.*

HAYGOOD PATTERSON as Commissioner of Agriculture & Industries of the State of Alabama, and GEORGE H. MARSH, as Director of the Division of Agricultural Chemistry in the Department of Agriculture & Industries of the State of Alabama.

*Respondents-Appellees.*

## BRIEF AND ARGUMENT FOR PETITIONER

### STATEMENT OF THE CASE

This case is brought here by certiorari ordered on the 7th day of April, 1941, to the United States Circuit Court of Appeals for the Fifth Circuit to review a decision of that Court made on the 14th day of Dec. 1940, reported 116 F (2) 227 wherein judgment of the District Court of the United States for the Middle District of Alabama dismissing complainant's bill on motion, without a trial on the merits, was affirmed; Circuit Judge Foster dissenting.

## Jurisdiction

The jurisdiction of this Honorable Court is invoked under Section 240 of the Judicial Code as amended, by Acts of February 13, 1925, Subsections (a) and (b) separately and severally, U. S. C. A., Title 28, Section 347, and also rule 38 of the revised rules of the Supreme Court of the United States adopted February 13, 1939.

*Lemke v. Farmers Grain Co., 258 U. S. 50.*

## Summary Statement of Matter Involved

The original verified bill of complaint filed in the District Court was brought by the Cloverleaf Butter Company, an Alabama corporation engaged in interstate commerce, seeking to enjoin respondent officials and agents of the Department of Agriculture and Industries of the State of Alabama from molesting or interfering with complainant's property and business in interstate commerce. No contention was ever made that the respondents did not have the right to take action in regard to any of complainant's products offered for sale in Alabama; but the relief prayed was to enjoin respondents from invading the field of interstate commerce already preempted and fully occupied by the Federal Government.

Relief prayed in the District Court was denied. Complainant appealed to the Circuit Court of Appeals and decision was rendered affirming the District Court with dissenting opinion by Judge Foster. On appellant's petition for certiorari filed in this Honorable Court the writ was granted on April 7, 1941.

## OPINION BELOW

The majority opinion of the Circuit Court of Appeals, 116 F (2d) 227, holds, (1) That although Congress has fully and completely occupied a field in interstate commerce the State may nevertheless take action in the same field *unless expressly excluded* by congressional language or its legal equivalent. (2) That Federal authorities must make compiaint of interference by State officers in a field preempted by Congress before a party whose business is affected may invoke the protection of his rights under the Federal Constitution.

The following excerpts from the majority opinion state the basis of the decision of the Circuit Court of Appeals:

> "We agree with the appellees however, that the district judge was right in denying the relief prayed and dismissing the bill as without merit. For, in our opinion, nothing in the act or regulations under it, *expressly purports to prevent*, or impliedly purports to exclude the state from making and enforcing like regulations with those the United States lays down, for the purity and wholesomeness of ingredients to be used in the process of manufacturing food products in Alabama for sale there and in other states."
>
> * * * * * *
>
> "Here the imagined conflict between state and federal authorities lies only in the fact that the federal authorities have failed to seize and condemn particular lots of butter which the state has found seizable. *There is no complaint on the part*

*of the federal authorities of any interference with them by the authorities of the state.* It is not claimed that the state is imposing any higher or other standards than the federal government imposes, indeed it is admitted that it is not. The sole claim is that in enforcing these nonconflicting standards the state has actually seized for condemnation, packing stock which United States inspectors have not so seized. The claim in short is, that the fact of its nonseizure by the federal inspectors is in effect, a certificate or finding that the articles are nonseizable and therefore immune for state seizure."

The correct rule is clearly and succintly stated by Circuit Judge Foster in his dissenting opinion in the following words:

"Conceding that the Alabama regulations are practically the same as the Federal regulations I consider that Congress has preempted and completely occupied the field as to the manufacture of processed butter for sale and shipment in interstate commerce. The law of Alabama, enforced by state officers, should not be permitted to interfere with the Federal Statute and regulations in respect to shipments in interstate commerce."

**The Case Made By The Bill**

Petitioner is an Alabama corporation engaged in business in Alabama under Federal license in the manufacture for sale and the sale of renovated butter. Ninety per cent of petitioner's product is manufactured for sale and sold in interstate commerce. Ten per cent of petitioner's product is sold locally. (R. p. 6.)

Respondents are officers of the Department of Agriculture and Industries of the State of Alabama.

Petitioner has been operating under Federal license and inspection and regulation for about twenty years without any effort on the part of the respondents to inspect its raw material or finished product in interstate commerce. (R. p. 2,)

Without any change in the statute or regulations of the state, in recent years the respondents suddenly began to stop trucks moving in interstate commerce from Georgia to Alabama loaded with country butter in route to petitioner's plant in Birmingham for processing and sale in interstate commerce, and to seize said butter before its interstate journey was at an end by delivery to petitioner's plant in Birmingham. Respondents also seized a quantity of butter at petitioner's plant delivered there for processing and sale in interstate commerce. Most of this butter was collected in states without Alabama and brought to Birmingham for renovation. Some of it was collected in Alabama. (R. pp 10 and 11.)

The respondents will, unless enjoined and restrained, continue their unwarranted interference with petitioner's raw material in interstate commerce. (R. p. 12.)

Country butter, referred to in the trade as packing stock butter, is the raw material used in the manufacture of process or renovated butter. It is acquired from small farmers and small producers of butter and small country stores and rolling stores that acquire the butter from small farmers or small producers of butter in ex-

change for cash, groceries or other commodities. (R. p. 5.)

Seventy-five per cent of the raw material handled by the petitioner originates without the State of Alabama and is transported to it in interstate commerce to Birmingham, Alabama. The raw material originating in Alabama is transported to the petitioner in Birmingham, Alabama, for manufacture of process or renovated butter for shipment in interstate commerce to points without the State of Alabama. None of the raw material is sold, offered, exposed or kept for sale. It is acquired solely for the purpose of being processed or renovated at petitioner's plant in Birmingham, Alabama. All of the raw material enters into the stream of interstate commerce from the time it is acquired by petitioner and remains in said stream until the delivery of the finished product. (R. p. 5.)

Raw country butter is not a food but raw material out of which a food is manufactured. *The respondents have not seized the raw material in interstat. commerce because it is acquired, held, offered or exposed for sale as food.* They have seized the raw material because they claim the right to prevent, by seizure, the renovation of raw butter moving in interstate commerce, although the Renovated Butter Act as construed by the Federal Court authorizes the renovation of such material.

Renovation is to butter as pasteurization is to milk. Renovated butter is raw country butter which has been melted, cleaned up and rendered wholesome and edible by washing, boiling, clarifying, straining, refining, steril-

izing and pasteurizing the butter fat or oil and mixing the clean butter fat with pasteurized milk and churning it.

When petitioner started in business about twenty years ago its output was about 100,000 pounds annually. Its business has grown to an annual production of two million pounds, having a value in excess of $300,000.00 each year. (R. p. 6.)

Its finished product is sold in most of the states and large cities of the Union under rigid requirements of the health laws in each jurisdiction.

**Renovated Butter Act**

Congress enacted the Renovated Butter Act in 1902. It is found in the Act of May, 1902, Chapter 784, 32 Stat. 193, as amended, and is now conveniently located in Sections 2320-2327 inclusive, of the Internal Revenue Code. A part of the title of the original Act was "To Regulate the Manufacture and Sale of Certain Dairy Products."

In Section 5 of the Act of 1902, now Section 2325, I. R. C., it is provided:

> "The Secretary of Agriculture *is authorized and required to cause a rigid sanitary inspection to be made* . . . . of all factories and storehouses where process or renovated butter is manufactured, packed . . . . and *of all the products thereof and materials going into the manufacture of same*. . . . The Secretary of Agriculture shall make all needful regulations for carrying this section and sections 2326 (c) and 2327 (b) into effect and shall cause to be as-

certained and reported from time to time the quantity and quality of process or renovated butter manufactured, and the character and the condition of the material from which it is made. *And he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product*, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States or in course of exportation or shipment he shall have power to confiscate the same."
(Emphasis supplied.)

Section 4 of the Act of 1902, now Section 2322, I. R. C., requires every manufacturer of process or renovated butter to conduct his business under such surveillance of officers and agents as the Commissioner of Internal Revenue, with the approval of the Secretary of Agriculture, may by regulations require.

**Regulations**

Order No. 1, Bureau of Dairy Industry, revised December 24, 1936, and promulgated by the Secretary of Agriculture on that date contained regulations that cover in detail every possible phase of the manufacture of process butter for sale or shipment in interstate commerce. The regulations are entitled, "Regulations for Carrying into Effect the Process or Renovated Butter Act" and are found on pages 20 and 34 of the transcript where they appear as an exhibit to the complaint.

Section 1 of Regulation 4 provides:

"Rigid sanitary inspections *will also be made of the character and condition of the materials going into the manufacture of processed or renovated butter* and all quantities and qualities of processed or renovated butter manufactured."

Section 12 of Regulation 4 provides:

"The Secretary of Agriculture will determine whether or not materials being used in the manufacture of process or renovated butter will be deleterious to health or unwholesome in the finished product. If any materials which have been so determined to be deleterious to health or unwholesome in the finished product are found to be present in any process or renovated butter, intended for, or in course of, exportation or shipment in interstate commerce, such process or renovated butter will be confiscated, as provided for in regulation 7, section 4 hereof."

Sections 1 and 2 of Regulation 7 provide:

"Section 1. *To determine whether or not materials used in the manufacture of process or* renovated *butter are deleterious to health or unwholesome in the finished product,* a sample of such processed butter shall be taken."

"Section 2. Such sample shall be drawn in the following manner: A sample will be taken from every package of each lot. However, (A) if a lot includes two or more packages from one churning, a sample may be taken from one package only; or (B) if the separate churnings are not indicated, not less than one sample from each 10 tubs may be taken. Additional samples may be taken if, in the

opinion of the inspector, such action is necessary to obtain representative samples of such butter."

The provisions of the Meat Inspection Act enabling Government agents to determine the suitability of raw material is made applicable to the Renovated Butter Act by Section 2327 (b) I. R. C.

The relevant provisions of the Renovated Butter Act, the Regulations for carrying it into effect, and the statutes of Alabama under authority of which respondents claim to act are set out under appropriate headings in the appendix.

No question of fact is involved. The legal questions in the case were stipulated between the parties and are found on page 36 of the record. They read:

**Stipulation**

"The parties to this cause stipulate and agree that the legal questions in dispute between the parties are:

1. Has Congress, by the enactments relating to renovated or process butter, pre-empted the field of inspection and regulation of the raw material, in interstate commerce, out of which such renovated or process butter is manufactured by the plaintiff as alleged in the bill, to the exclusion of the power of the State, its officers or agents to inspect and regulate the quality of such raw material?

2. Does the inspection of packing stock butter, in interstate commerce, used by the plaintiff in the manufacture of process or renovated butter as alleged in the bill of complaint, made or directed to be made by the Secretary of Agriculture of the

United States, pursuant to the Federal laws and regulations relating to renovated or process butter, have the effect in connection with said Federal laws of excluding the State of Alabama, its officers and agents, from inspecting or seizing or suspending the packing stock butter, in interstate commerce out of which renovated butter to be sold in interstate commerce as alleged in the complaint is manufactured by the plaintiff as alleged in the complaint?

"3. Under the Federal statutes, is the Secretary of Agriculture of the United States the sole judge, to the exclusion of State officers and agents, of the fitness and suitability of packing stock butter, in interstate commerce as alleged in the bill, for use by the plaintiff as raw material in the manufacture of renovated or process butter for sale in interstate commerce as alleged in the bill?

"4. It is further stipulated and agreed that there is no conflict in the standards of the State of Alabama and the Federal Government, relating to the fitness or suitability of packing stock butter in interstate commerce to be used as raw material in the manufacture of renovated or process butter, and that this case be confined to the legal questions set out in paragraphs 1, 2, and 3, above.

"5. It is agreed that the phrase "in interstate commerce" as used in this stipulation, shall be construed to mean 'procured, transported, handled, or sold as alleged in the complaint,' as the context may indicate."

The bill was dismissed on motion alleging it failed to state a claim upon which relief could be granted and presented no substantial Federal question. (R. p. 34.)

## SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In affirming the decree of the United States District Court for the Middle District of Alabama.

2. In holding, in effect, that Congress has not pre-empted the field as to the inspection and regulation of raw material in interstate commerce for manufacture into processed butter for sale and shipment in interstate commerce.

3. In holding, in effect, that the Alabama statute (the Alabama Agricultural Code) authorzies officers of the State of Alabama to seize raw materials moving in interstate commerce for manufacture into processed butter for sale and shipment in interstate commerce.

4. In holding, in effect, that State officers may supplement and duplicate the work of the Federal Government in policing raw material in interstate commerce going into the manufacture of process butter for sale and shipment in interstate commerce.

5. In holding, in effect, that to obtain relief from enforcement of State Police Regulations upon the claim that Federal Regulations have pre-empted the field, it must appear that there is *an express or implied prohibition against State regulations.*

6. In holding, in effect, that to obtain relief from enforcement of State Police Regulations upon the claim that Federal Regulations have preempted the field, it must appear that there is such an essential conflict between State and Federal laws and regulations as that

compliance with the one is defiance of the other, and therefore a prohibition against State regulation must be implied.

7. In holding, in effect, that State officers enforcing by seizure police regulations with regard to foods, will not be enjoined at the suit of persons complaining of them merely because there exist similar Federal laws and regulations in respect to the same subject matter and there has been no Federal seizure.

## PROPOSITIONS OF LAW

### Proposition One

(a) The allegations of the complaint show that the matter in controversy, exceeds, exclusive of interest and costs the sum or value of $3,000, and arises under the Constitution or laws of the United States. The action is thus cognizable under Section 41, subdivision 1 of the Judicial Code.

U. S. C. A. Title 28, Section 41.
*Grandin Farmers Co-Op. Elevator Co. vs. Langer* (Three Judge Court), 5 Fed. Sup. 425;
Affirmed memorandum opinion 292 U. S. 605,
*Lemke vs. Farmers Grain Co.*, 258 U. S. 50;
*Vicksburg Waterworks Co. vs. Vicksburg*, 185 U. S. 66;
*The Fair vs. Kohler Die Co.*, 228 U. S. 22.

(b) In an action charging State officials with construing and attempting to enforce State Statutes in such

a manner that the same are in conflict with the Constitution or laws of the United States or rights thereby vested are infringed upon, and the amount in controversy exceeds the sum of $3,000, a federal question is presented, the Federal Courts being concerned with the operation and effect of the State laws as put in force by its authorized officers. Such action is not one against the sovereign State.

*General Oil Co. vs. Crain*, 209 U. S. 212;
*Smyth vs. Ames*, 169 U. S. 466;
*Reagan vs. Farmers Loan and Trust Co.*, 154 U. S. 362;
*St. L. & S. W. R. Co. vs. Arkansas*, 235 U. S. 350;
*Mountain Timber Co. vs. Washington*, 243 U. S. 219.

(c) The action may also be predicated under subdivision 8 of Section 41 of the Judicial Code by which jurisdiction is given District Courts "of all suits and proceedings arising under any law regulating commerce."

*Young & Jones vs. Hiawatha Gin & Mfg. Co.*, 17 Fed. (2nd) 193;
*Davis vs. Age-Herald Pub. Co.* (C. C. A. 5th Cir.), 293 Fed. 591.

**Proposition Two**

Congress has preempted the field of inspection and regulation of packing stock butter in commerce.

Renovated Butter Act of 1932;
32 Stat. 193-197; 37 Stat. 273;;
U. S. C. A. Title 26, Sec. 990-997, I. R. C. Sec. 2320-2327;
U. S. Department of Agriculture Regulations for Carrying into Effect the Process or Renovated Butter Act, Bureau of Dairy Industry Order No. 1. Revised issued December 24, 1936;
*Oregon-Washington Railroad Company v. Washington*, 270 U. S. 87;
*Napier v. Atlantic Coast Line*, 272 U. S. 606;
*Southern Railway v. Reed*, 222 U. S. 424
*Gibbons v. Ogden*, 9th Wheaton 1.

**Proposition Three**

The full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. On the contrary, wherever interstate and intrastate transactions are so related the government of the one involves control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule.

15 *Corpus Juris Secundum*, Sec. 7, page 264;
11 *Amer. Jur.*, Sec., 14, page 16;
*Minnesota Rate Cases*, 230 U. S. 352;
*Currin vs. Wallace*, 95 Fed. (2d) 856, Aff. 59 Sup. Ct. 379.
*Id.* 306 U. S. 1
*Stafford vs. Wallace*, 258 U. S. 495, 528;
*Chicago Board of Trade vs. Olsen*, 262 U. S. 1, 43;
*Lemke vs. Farmers Grain Co.*, 258 U. S. 50.

**Proposition Four**

The Alabama Agricultural Code does not extend to or include interstate commerce.

*State vs. Cecil*, 216 Ala. 391.

**Proposition Five**

Where Congress regulates commerce by enacting a statute within its competency the exercised power of Congress supersedes any existing state law on the same subject, and excludes additional or further regulation covering the same subject by the state. *It is not necessary for Congress to expressly exclude state action in such cases.*

*Southern Railway v. Reed*, 222 U. S. 424;
*Napier v. Atlantic Coast Line*, 272 U. S. 605;
*Oregon-Washington Company v. Washington*, 270 U. S. 87;
*North Pacific Railroad Co. v. Washington*, 222 U. S. 370;
*Prigg v. Penn.*, 16 Peters 539;
*Erie Railroad Co. v. N. Y.*, 233 U. S. 671;
*N. Y. C. R. R. Co. v. Winfield*, 244 U. S. 147;
*Erie Railroad Co. v. Winfield*, 244 U. S. 170;
*C. R. I. & P. Railroad Co. v. Hardwick Co.*, 226 U. S. 426;
*Missouri Pacific Railroad Co. v. Porter*, 273 U. S. 341;
*Farmers Grain Company v. Langer*, 273 Fed. 633;
*L. & N. Railroad Co. v. State*, 16 Ala. App. 199; Supreme Court Opinion at page 204;
*Hines v. Davidowitz*, 61 Sup. Ct. Rep. 399;

*Missouri Pacific Railroad Co. v. Stroud*, 267 U. S. 404;
*Adams Express Co. v. Croninger*, 226 U. S. 491;
*Charleston & W. C. R. R. Co. v. Varnville Furniture Co*, 237 U. S. 597;
*Missouri Pacific Railroad Co. v. Porter*, 273 U. S. 341.

(b) "The elementary and long settled doctrine is that there can be no divided authority over interstate commerce, and that the regulations of Congress on that subject are supreme."—White, C. J. in C. R. I. & P. R. R. Co. vs. Harwick Farmers Elevator Co., supra.

(c) Congress, having entered into the regulation of a particular subject of interstate commerce, "must be deemed to have determined that the rule laid down and the means provided to enforce it are sufficient, and that no other regulation is necessary. Its power to regulate such commerce and all its instrumentalities are supreme; and as that power has been exercised, state laws have no application. They cannot be applied in coincidence with, as complementary to, or in opposition to federal enactments, which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction."

*Missouri-Pac. R. Co. v. Porter, Supra.*

**Proposition Six**

Inasmuch as Congress has entered the field of inspecting the raw materials used by plaintiff and the determination of their suitability for use in the finished

products to be sold in interstate commerce, the plaintiff has the right to conduct its business in interstate commerce without interference on the part of the defendants acting under State laws, whether otherwise applicable or not, but which, at most, undertake to cover precisely the same ground under the same standards as the Federal regulation.

*Farmers Grain Co. v. Langer*, 273 Fed. 635, affirmed, 258 U. S. 50.
*McDermott v. Wisconsin*, 228 U. S. 115.

**Proposition Seven**

(a) State statutes *relating to food* which have been held not to conflict with federal legislation regulating commerce, and not to regulate directly, or to impose a direct burden on interstate commerce, are those controlling food in the *intrastate* aspect of the public health, and statutes which are similar to the federal Pure Food and Drug Act, but relate only to intra-state transactions, or which deal with the adulteration of food and drugs, but are intended to protect consumers in the state, *and are not applied to articles manufactured in the State and transported in interstate commerce.*

15 *Corpus Juris Secundum*, Sec. 86, page 429.

(b) The general tendency of the Courts and of most local enforcement agencies is to so construe state statutes, regardless of the generality of their terms, and to confine their operations to intrastate matters, so as not

to conflict with Federal enactments or otherwise invade the field of interstate commerce.

*State v. Cecil,* 216 Ala. 391;
*Day-Beigwall Co. v. State,* 207 N.W. 959, 190 Wis. 8;
*State v. Peet,* 80 Vt. 449, 130 A. S. R. 998, 14 L. R. A. (N. S.), 677;
*L. & N. R. R. Co. v. State,* 16 Ala. App. 199 (Supreme Court response, p. 204).

(c) The committee reports and debates in Congress when this act was under consideration show that Congress was fully aware of the necessity for regulating and providing for proper inspection of this industry and that its intention to enact laws to fully cover the field and adequately protect the public is beyond question.

Congressional Record 57th Congress, pages 1301, 1303, 1352, 1595, 1624, 1625, 1630, 1658, 3278-79, 3282; 3316, 3459; 3607; 3241, 3242; 3271, 3272; 3277, 3282, 3283; 3316, 3321, 3454, 3459, 4586.
Appendix 46-47; 177-178.
Senate Committee on Agriculture pages 4, 5, 6, 7, 8, 9, 24, 49, 50, 51, 52, 53.

**Proposition Eight**

(a) Under the facts alleged in the bill, plaintiff's operations in buying, transporting, storing, and manufacturing the packing stock butter and sale of the finished product in interstate commerce constitute by far the greater portion of its business; its interstate and intrastate operations are necessarily indivisible. It is,

consequently, considered as engaged in interstate commerce, and to be regulated as such.

*Grandin Farmers Co-op. Elevator Co. v. Langer*, 292 U. S. 605.
*U. S. v. Darby Lbr. Co.*, 61 Sup. Ct. 451.
*Labor Board v. Jones & Laughlin*, 301 U. S. 1.
*Lemke v. Farmers Grain Co.*, 258 U. S. 50.
*Shafer v. Farmers Grain Co.*, 268 U. S. 189.
*Nor. Pac. Ry. v. Washington*, 222 U. S. 370.
*Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282.
*Currin v. Wallace* (C. C. A. 4th Cir.), 94 Fed. (2nd) 856.
*Affirmed U. S. Supreme Court*, 306 U. S. 1.
*Nat'l Labor Relations Board v. Wallace Mfg. Co.*, 95 Fed. (2nd) 818.
*Nat'l Labor Relations Board v. Santa Cruz Etc. Co.*, 91 Fed. (2d) 790, affirmed 303 U. S. 453.
*Wilson & Co. v. Nat'l Labor Relations Board*, 103 Fed. (2nd) 243.
*Tagg Bros. v. U. S.*, 280 U. S. 420.

(b) In determining what is interstate commerce, Courts look to practical considerations and the established course of business.

*Foster-Fountain Pkg. Co. v. Haydel*, 278 U. S. 1.

**Proposition Nine**

Articles moving in interstate commerce cannot be interfered with before transit is completed even though subjected to State police power by congressional action.

*Rhodes vs. Iowa*, 107 U. S. 412.

## ARGUMENT

*May It Please The Court*:

We are not dealing with food in this case, but with raw material used in the manufacture of food. In so far as renovated butter is concerned State and National legislation is identical.

Title 2, Section 306 of the 1940 Alabama Code, under which respondents claim authority to stop a truck loaded with country butter moving in interstate commerce from Georgia to Alabama, provides:

> "Section 306. Adulteration of food—An article shall be termed adulterated *in the case of food*: . . . . if it consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance."

Section 11 of Regulations 5 of the Regulations which carry into effect the Process or Renovated Butter Act issued December 24, 1936 by the United States Department of Agriculture, as embodied in Bureau of Dairy Industry, Order No. 1, provides as follows:

> "Section 11. Process or renovated butter containing any filthy, decomposed or putrid animal or vegetable substance shall be termed adulterated under the Foods and Drug Act."

In Alabama Agriculture Code 1927, §36 now Title 2, Section 303, of the 1940 Alabama Code, the Legislature of Alabama made it the duty of the State Board of Agriculture to fix the standard of purity for *all food*

"which shall be, so far as practical, in accordance with the standards promulgated by the Federal Government through its duly authorized agents."

As regards standards for the raw material out of which renovated butter is manufactured, the parties stipulated and agreed that there is no conflict in the standard of the State of Alabama and the Federal Government relating to the fitness or suitability of packing stock butter in interstate commerce to be used as raw material in the manufacture of renovated or process butter. (R. p. 36.)

The complaint in this case is, not there is conflict between State and Federal standards. The complaint is that the State is precluded from enforcing any standard for packing stock butter in interstate commerce *because Congress has already prescribed a standard for it and provided for its enforcement.* A further complaint is that the *respondents*, State officers, *have gone* and intend to continue going beyond the standard provided by Congress *and beyond any State standard for packing stock butter* and are attempting to compel the raw material in interstate commerce to conform to a standard that is not applicable to packing stock butter. Concretely stated the Congressional standard for raw material used in the manufacture of renovated butter is whether or not the materials entering into its manufacture are deleterious to health or unwholesome *in the finished product.* If the materials used are deleterious to health or unwholesome *in the finished product* they are under Congressional ban and inhibition. If the materials used are not deleterious to health or unwholesome in the fin-

ished product they are not under Congressional ban and are recognized by Congress and by the State as a legitimate article of commerce. This, we think, is made clear by Section 2325 of the I. R. C. and the Regulations promulgated pursuant thereto above referred to and by Title 2, Section 207 of the Alabama Code of 1940.

The respondents refuse to abide the Congressional standard provided for raw material used in the manufacture of renovated butter. The respondents are attempting to apply the standard prescribed *for food offered for sale as food*, in Title 2, Section 306 of the Alabama Code of 1940, to raw material instead of the standard prescribed by Congress. This presents the question whether Congress has completely entered and preempted the field of inspection and regulation of the raw material, and if so does such entry and preemption exclude state action in that field.

A

**Congress Has Preempted the Field of Inspection and Regulation of Packing Stock Butter in Interstate Commerce.**

This proposition is established by three things: (1) The affirmative action by Congress reflected in the Renovated Butter Act. (2) The comprehensive regulations promulgated by the Secretary of Agriculture of the United States completely covering the subject pursuant to the statute enacted by Congress. (3) Recognition and decision by the Supreme Court of Alabama that the Alabama Agricultural Code does not extend to or include interstate commerce.

When the Federal statutes and regulations relating to renovated butter are considered and analyzed, this question naturally arises: *"What more could Congress do than it has done to exclusively occupy the field of inspection of raw materials in interstate commerce going into the manufacture of process or renovated butter?"* We might phrase the question another way: *"What may the State of Alabama do in the way of inspecting raw material in interstate commerce going into the manufacture of process or renovated butter that the Secretary of Agriculture of the United States is not authorized to do by the Federal law and the regulations, which have the force and effect of law, promulgated pursuant to the mandate of the Federal Statute?"*

It is quite clear that anything that the State undertakes to do in the field of inspection of raw material entering into the manufacture of renovated butter is necessarily a duplication of a duty required of the Secretary of Agriculture by the Renovated Butter Act, or it is an attempt to do something the Secretary of Agriculture has not deemed necessary. Congress has very definitely and very clearly made it the duty of the Secretary of Agriculture to determine whether the materials in interstate commerce going into the manufacture of renovated butter are deleterious to health or unwholesome *in the finished product.* How he determines that is left up to him. Congress very wisely left the method to be used in the performance of that duty exclusively to the Secretary of Agriculture. It recognized that methods may change as time passes on, and left him free to use any available method.

Congress having expressly authorized the Secretary of Agriculture of the United States to inspect the raw material in interstate commerce and to determine the wholesomeness and purity of the finished product in interstate commerce, it would seem that there is no warrant for respondents usurping his authority or undertaking to perform his duty. In the very nature of things authority should be vested in some official to determine whether raw material for manufacture into renovated butter is fit to enter and be transported in the channels of commerce. It may be that the State might act in the absence of Congressional action, but that is not the case at bar. *In this case Congress has acted.* Congress has designated the Secretary of Agriculture of the United States as the official on whom it imposed the duty to determine whether or not raw material for manufacture into renovated butter is entitled to enter the channels of interstate commerce. We do not believe that the Renovated Butter Act or the regulations above referred to are capable of any other construction.

The Renovated Butter Act is as comprehensive, if not more comprehensive than the Interstate Commerce Act construed in *Southern Railway Company vs. Reid*, 222 U. S. 424-442.

It is more comprehensive than the Boiler Inspection Act construed in *Napier vs. Atlantic Coast Line*, 272 U. S. 606. In that case Congress had not legislated specifically in respect to the device involved, which was an automatic fire box door and a cab curtain required by the State Act to conserve the health of the fireman

by protecting him from exposure to extremes of heat and cold while performing his duties.

The power delegated to the commission in that case was a general one. The power delegated to the Secretary of Agriculture in this case is even broader. He is required to determine whether raw material entering into the manufacture of renovated butter should be allowed to enter the channels of commerce, and he is given unrestricted authority to promulgate rules and regulations to enable him to perform that duty.

The Renovated Butter Act is as comprehensive as the Quarantine Act involved in the case of *Oregon-Washington RR. Co. vs. Washington*, 270 U. S. 87. In that case the Secretary of Agriculture was empowered to determine when a quarantine was necessary to prevent the spread of dangerous plant disease or insect infestation. In passing on that Act the Court said:

> "It is impossible to read this statute and consider its scope without attributing to Congress the intention to take over to the Agricultural Department of the Federal Government the care of the horticulture and agriculture of the States, so far as these may be affected injuriously by the transportation in foreign and interstate commerce of anything which by reason of its character can convey disease to and injure trees, plants or crops. All the sections look to a complete provision for quarantine as between the States under the direction and supervision of the Secretary of Agriculture."

And so say we here. It is impossible to read the Renovated Butter Act and consider its scope without

attributing to Congress the intention to take over to the Agricultural Department of the Federal Government the duty of determining whether raw material entering into the manufacture of renovated butter should be permitted in the channels of commerce. All the sections and all the regulations promulgated under the statute look to complete control of raw material in interstate commerce by the Secretary of Agriculture of the United States.

**Legislative History of the Act of 1902**

In our opinion, a better understanding of the objects and purposes of the Federal Renovated Butter Act of 1902 may be obtained by a brief outline of the origin and history of the product, as disclosed by Committee hearings and debates while the subject was under consideration by Congress, as well as Year Books and Bulletins of the United States Department of Agriculture, Trade Journals and matters of common knowledge.

Preceding any legislation respecting the product, considerable traffic under various trade names of re-worked, re-packed and manipulated farm butter had developed throughout the principal dairying sections and in shipments to large manufacturing centers.

When it is stated that not until 1917 did the manufacture of creamery butter exceed the output of farm made butter in the United States (Technical Bulletin No. 722 U.S.D.A.) the extent and magnitude of the trade is apparent.

Factory or creamery butter, as a separate commodity, was first listed in United States Census tabulations

in 1879 when only 29,422,000 pounds of butter were factory made. In 1900, 71% of all butter produced was farm made butter. Within most recent years, the output of farm butter is said to have averaged nearly one-third of creamery butter.

At the turn of the century, practically all farm butter was sold and handled through country stores in exchange for staple food products.

With such a volume of farm made butter its sale, distribution and regulation became a problem of considerable importance. Especially in view of the fact that the consumers in the industrial centers are usually a great distance from the farms where it is produced, and as the natural product is subject to becoming rancid and other undesirable features if not properly handled.

At first, farm made butter was sold in towns and cities as it was delivered by the farmer. Later, such butter was centralized in larger towns or cities where it was washed, reworked, resalted, and colored uniformly and marketed as "Ladle," "Factory," or "Imitation Creamery" butter. Under such conditions, the quality of the materials, the sanitary conditions surrounding the processing, and the wholesomeness of the product, varied according to the varying standards of the individual producer. In 1894 a commercial "process" factory was established in Chicago, which was probably the first of its kind. Others rapidly followed.

Patents covering the process of melting and aerating the melted butter oil before rechurning in milk or cream were granted in 1895 and other patents covering various methods of treating such farm butter by use of

chemicals were also granted. As early as 1883 experiments for treating miscellaneous lots of farm butter by melting and rechurning were commenced in Missouri, and in 1885 in Baltimore, Md: (1905 Year Book U. S. D. A.). Such treated or manipulated butters were first sold to jobbers under various names,—"Process" Butter being the one most commonly used. It is said that in practically all cases, however, such treated butters were sold to the consumer, either as dairy butter or creamery butter.

Following the increased number of creameries and factories making process or renovated butter, a number of States adopted Renovated Butter laws during the period from 1898 to 1901 for the purpose of preventing the sale of such process or renovated butter for other than what it actually was—a remade, reworked or manipulated product. Unlike most other laws pertaining to dairy products, the principal purpose of all of these early State regulations (as far as we have been able to ascertain) seemed to be merely to prevent fraud and deceit, rather than to protect the health of the consumer.

As shown by the Act of 1902 and the amendment of 1912, Congress, in taking cognizance of the situation, not only required the product to be plainly labeled and sold for what it actually is, but went further, and made full and complete provisions for the complete inspection and regulation of the raw materials, the storage and manufacturing facilities and the finished product itself; making the wholesomeness of the finished product the test of its right to be transported in interstate

commerce. It also charged the United States Secretary of Agriculture with the duty of inspecting such raw materials, factories, finished products, etc., and of promulgating the necessary regulations for the absolute control of the industry when engaged in interstate commerce.

With the advent of the National Law of 1902, the States thereafter seem to have paid little attention to the enforcement of their local laws, as it was considered that such factories and product were more completely controlled and regulated by the rules and inspection afforded under the Federal laws by the Department of Agriculture.

Although the State of Alabama, in 1923, adopted a Pure Food law modeled after the National Pure Food and Drug Act of 1906, which was subsequently embraced in the Agricultural Code of 1927, among the provisions of which butter produced by any process commonly known as boiled, process or renovated butter was prohibited to be sold in the State unless the word "Renovated Butter" be labeled plainly with Gothic or bold faced letters at least three fourths of an inch in height on the top and sides of the container (Agricultural Code, 1927, sec. 71; Code of Alabama, 1940, Title 2, sec. 207) until recently, no interference has been made by State officials with the packing stock (the use of which is recognized in section 71) or other interstate features of appellant's operations.

**Purpose of Act**

The Legislative History of the renovated butter act as shown by the records of the 57th Congress at which it was adopted clearly evidences the knowledge of Congress of conditions then existing in that industry and its purpose to provide effective regulation and inspection of the raw materials used and the sanitary conditions under which process or renovated butter is manufactured.

This act had its genesis in legislation relating to oleomargarine. The first Federal action along this line was the Act of August 2, 1886, chapter 840, 24th Statutes 209, which did not touch the subject of process or renovated butter. In the 56th Congress a bill was introduced in the house known as the Grout Bill which undertook to further regulate the oleomargarine industry, but did not mention process or renovated butter. Lengthy hearings were held by the House Committee on agriculture and that bill passed the House but not the Senate.

The same bill was re-introduced in the House in the succeeding 57th Congress (House Bill 9206) and again referred to its Committee on Agriculture where, after further hearings, a majority reported favorably and a substitute was offered by a minority. Neither report made any references to process or renovated butter.

At that time many process butter factories were being operated throughout the country. Statement was made on the hearing before the Senate Committee February 18, 1902, that there were about 485 renovated

butter factories in the country and only about 27 oleomargarine factory.

"Senate Hearing on House Bill 206, Senate Committee on Agriculture," page 24.

Both before the House and the Senate Committees in the debates in both Houses frequent references were made to the deplorable conditions of the raw material used to manufacture renovated butter, the manner in which it was gathered, and the unsanitary methods employed in the plants themselves. It was charged that the necessity for effective regulation and inspection of the process or renovated butter was much greater than that of oleomargarine. The opponents of the oleomargarine bill challenged those favoring it to sponsor legislation which would remedy the evils in the process or renovated butter business. (See Congressional Record, 57th Congress, House Bill 9206, pages 1301, 1303, 1352, 1353, 1595, 1624, 1625, 1630, 1658; speech by Mr. Grosvener, appendix pages 46-47; 177-178). While the matter was under discussion in the House, Mr. Allen of Kentucky introduced an amendment to the oleomargarine bill (Congressional Record, page 1352) which provided that the Secretary of Agriculture was authorized and required to cause a rigid sanitary inspection to be made from time to time and at such times as he may deem necessary of all factories and store houses where butter is renovated; and all butter renovated at such plants shall be carefully inspected in the same manner and to the same extent and purpose as meat products were then inspected, and that the quantity and the quality of butter renovated should be reported monthly; and

requiring such butter to be branded or labeled as renovated butter in such manner as the Secretary of Agriculture might prescribe and authorizing the Secretary of Agriculture to make all necessary sanitary and other rules and regulations for carrying that section into effect.

The Allen Amendment did not contain the provisions that the Secretary of Agriculture, "shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome material is found to be used in products intended to be used in exportation or shipment into other states, he shall have power to confiscate the same," as is provided by the law which was finally adopted.

The bill with the Allen Amendment was adopted in the House February 12, 1902 (Congressional Record, 57th Congress, page 1658).

In the Senate the bill was referred to its Committee on Agriculture which also conducted hearings. There the opponents again made frequent charges concerning the raw material and conditions pertaining to the process or renovated butter industry and its need for regulation. (Senate Hearings on House Bill 9206, Senate Committee on Agriculture, pages 4, 5, 6, 7, 8, 9, 49, 50, 51, 52, 53). However, the majority report struck the Allen Amendment and reported the bill as it was first introduced in the House. On the floor of the Senate the charges concerning the renovated butter industry were more frequent and fuller. The committee was criticized

for recommending elimination of the Allen Amendment.

Many Senators objected to the passage of the bill without provisions regulating process or renovated butter. Senator Culbertson offered an amendment to the entire bill (Congressional Record, pages 3278-79). In the discussion Senator Lodge stated that he favored the oleomargarine bill but further said: "Whatever may be thought of oleomargarine—I believe in itself it is generally considered an innocuous product. There is no doubt that process butter, renovated butter, is as bad an article as can possibly be devised; and I do not think this bill ought to pass without a suitable provision in regard to renovated butter." It was then stated by Senator Quarrels that an amendment had been offered which provided for that (Record, page 3282).

Senator Proctor then stated, in substance( that the Committee reported in favor of striking out the Allen Amendment for the reason that it was very imperfect and would not accomplish the purpose aimed at and that Senator Harris had offered an amendment fully covering renovated or process butter and adulterated butter (Congressional Record, page 3282).

The Harris Amendment is set out on page 3316 of the Congressional Record. This amendment, though amended in some respects, forms the basis of the present law relating to process or renovated butter. Concerning his amendment, *Senator Harris said*: "* * * *There has been a great deal of complaint made and I think with justice, that the health of the consumer is injured by what is called process or renovated butter. I*

*think the amendment I have offered practically protects in the most efficient way, the interest of the consumer in that direction.*" (Congressional Record, page 3316.) (Emphasis supplied.)

He further referred to the condition of material and methods of manufacture of oleomargarine prior to the Act of 1886 which he said were checked by that Act and that the bill had been the salvation of that industry and stated:

> "I believe that the regulation which is imposed upon renovated or process butter by the amendment which I have offered will be of equal value to the great dairy interest of this country. They are in danger, I think, of being rendered obnoxious on account of the improper process used by the manufacturers of renovated or process or adulterated butter. *Because it is to protect the purity of the food products of this country I think that this legislation justifiable and proper*" (Congressional Record, page 3317). (Emphasis supplied.)

During the discussion, *Senator Proctor who had charge of the bill stated that the Harris Amendment so far as butter is concerned, is a Pure Food Bill* (Congressional Record, page 3459).

The Harris Amendment in its final form as adopted by the Senate is set out on page 3607 of the Congressional Record. The bill was passed by the Senate April 3, 1902. Statements concerning the character of the raw material and other conditions in the process or renovated butter industry and the necessity for congressional action for the protection of the public by

regulation and inspection as shown by the Congressional Record, were made by: Senator Money, pages 3241-3242; Senator Proctor, page 3242; Senator Stewart, pages 3271-3272; Senator Dolliver, page 3277; Senator Lodge, page 3282; Senator Quarrels, page 3282; Senator Proctor, page 3282; Senator Stewart, pages 3282-3283; Senator Harris, pages 3316-3317; Senators Heitfeld, Harris and Money, page 3321; Senator Simmons, page 3454, and Senator Proctor, page 3459.

In explaining changes made by the Senate to the House sitting as a Committee as a whole, Mr. Henry among other things stated (Congressional Record, page 4586) that the Senate amendment struck out the imperfect House provision for regulating the manufacture of process or renovated butter and substituted a sure and comprehensive law for identification and taxation of the product under supervision of the Treasury Department, and for inspection, sanitary control and regulation under the Department of Agriculture.

In view of the fact that Mr. Henry had at first objected to the incorporation of the Allen Amendment into the House bill, it is significant that after quoting from a statement by Mr. Wells, Dairy Commissioner of Pennsylvania, as to materials used and methods of manufacturing renovated butter he stated, "With these facts before us, who can say that restrictive legislation is unnecessary" (Congressional Record, page 4586).

He further said (Congressional Record, page 4587), "It is anticipated that this legislation will prevent fraud, protect the public from an article of food of unknown

or doubtful origin, and insure to the purchasers of butter the pure product of the churn and dairy."

With an unimportant amendment as to the definition of process or renovated butter the House concurred in the Senate Amendment April 3rd, 1902.

In the *Bohl case*, 125 Fed. 625, at p. 626, the Court said:

> *"Other provisions of the (Renovated Butter) Act in question may gain their efficacy from the taxing clause of the Constitution, but Section 5 goes to the commerce clause as the fountain whence its vigor springs."* (Italics supplied.)

The Section 5 referred to by the learned Judge is now codified as Section 2325 of the Internal Revenue Code, which makes it the duty of the Secretary of Agriculture to determine the suitability of raw material used in the manufacture of renovated butter.

*The authorities cited and the language employed in the Statute negative the idea that the primary purpose of the Renovated Butter Act was to raise revenue.* The revenue feature is incidental.

The legislative history of the Act of August 10, 1912, chapter 284, 37 Statute at Large 273, is also most significant and evidences the continuing purpose of Congress to give full authority to the Secretary of Agriculture to inspect the raw material prior to its being processed, in order to clear up a question which had been raised by the solicitor of the Department of Agriculture as to the authority of the Secretary in that respect.

This act was a part of the Agricultural Department

appropriation Act of August 10, 1912, and is codified as Section 997 (b), (c) Title 26, United States Code Annotated. Section 2327 (b) (c) I. R. C. The text of the act being: "That the sanitary provisions for slaughtering, meat canning, or similar establishments as set forth in Act of June 30, 1906, (34 Statutes, page 676) are hereby extended to cover renovated butter factories as defined in the Act of May 9, 1902, under such regulations as the Secretary of Agriculture may prescribe."

This provision was contained in House Bill 18960 as reported by the Committee on Agriculture.

In speaking of this provision, when it was left to the House sitting as a committee as a whole, Mr. Lamb said:

> "Mr. Chairman, this matter was carefully gone over by the committee, and I submit the following: there are some fifty renovated butter factories in the United States, and while the department is authorized to inspect the finished products, it has no authority to destroy the butter that is made up into the finished product, nor has the authority to compel sanitary conditions in such factories. Such opportunity is sought by the amendment requested. We asked Dr. Melvin particularly on this point."

He then quoted from the testimony of Dr. Melvin before the Committee and further said:

> "We interrogated other men who were before us on this point and came to the conclusion that notwithstanding the fact that this new language was subject to the point of order, that it was so necessary, we would submit it to the House in confidence that it was good legislation and ought to be adopted."

(H. B. 18960, 62nd Congress, page 2690-2691).

This legislative history shows that the purpose of the amendment was to clarify the law and remove any doubt as to the authority of the Secretary of Agriculture to seize the raw material if it was unfit for conversion into a wholesome finished product. The amendment was advocated by the solicitor of the Department of Agriculture and experts from that department supported it by testimony. The amendment was thrown out on a point of order in the House and restored to the bill in the Senate and it was adopted by a conference committee and approved by the House and Senate. (Congressional Record).

The Government has already taken cognizance of the tendency of various states to interfere with renovated butter in interstate commerce. In a summarized report of the legal subcommittee of the Interdepartmental Committee on Interstate Trade Barriers, published December, 1940, attention is called to the effort on the part of some of the States to interfere with renovated butter in interstate commerce in the following language:

> "The Bureau of Dairy Industry, United States Department of Agriculture directs attention to the laws of the various States relating to process or renovated butter and the relationship of such laws to Federal regulation covering the same subject matter. It is the opinion of the administrative officials of the Bureau of Dairy Industry that several States have laws which conflict with such Federal law. The Subcommittee is of the opinion that the Committee might advantageously cooperate with

the Bureau of Dairy Industry in securing the removal of these conflicting State laws."

That there is a field for the process or renovated butter business must be conceded. Otherwise, a large quantity of farm butter would be absolutely wasted, and many consumers deprived of the use of a most healthful article of food. It is also true that under modern conditions, the farm butter must be obtained from the producers themselves, or more frequently, the small country and rolling stores, and transported in interstate commerce to plants hundreds of miles from the farm where it originated, to a large establishment, and then after the process of cleaning, pasteurization, clarifying, rechurning, etc., has been completed, again shipped to the various industrial centers all over the country. That efficient regulation is necessary is not questioned, but, on the other hand, welcomed by the appellant; that such inspection and regulation should be made by experts in the line and under uniform standards, rather than whimsical or partisan methods seems to us to be equally true.

Congress has attempted to meet the situation by the Act of 1902 and the application of the Meat Inspection Laws. That the United States has and should have complete staffs and facilities for the performance of his duties under these laws can scarcely be a matter of argument; that the regulations promulgated by the Secretary are strict and complete and that the Bureau of Dairy Industry to which the enforcement of the regulations has been committed is both conscientious and efficient is not debatable.

As a matter of history, only those plants that have been able and willing to meet the rigid federal inspection and regulation have survived.

The plants that have stood the test have established a large and ever increasing business in interstate commerce, and we might add, are constantly striving to improve their products.

The record in this case shows without dispute that the appellant has built up a large business during its twenty years operation, and is unable to supply the demand for its finished product. With due respect, we might adopt the slogan of a well known, nationally advertised product: "Such popularity must be deserved."

As we understand the opinion of the Circuit Court of Appeals that Court seems to have conceded that Congress has occupied the field by legislation and most comprehensive regulations, but the Court seems to say that the State may also enter the field until Congress expressly tells the State to stay out.

That brings us to the second proposition in the case.

B

Where Congress regulates commerce by enacting a statute, within its competency, the exercised power of Congress supersedes any existing State law on the same subject, and excludes additional or further regulation covering the same subject by the State; express exclusion by Congress is unnecessary.

The Circuit Court of Appeals in the majority opinion apparently concedes that Congress has completely occupied the field of inspection and regulation of raw ma-

terial in interstate commerce for manufacture into renovated butter. Neither our learned Attorney General nor the Circuit Court of Appeals has thus far pointed out any portions of the field unoccupied by Congress, but, says the Circuit Court of Appeals in effect, complete occupancy by Congress does not have the effect of excluding the State from the field unless Congress goes further and erects a "No Trespassing Sign" so to speak, reading something like this: "Congress has completely occupied this field. All others must keep out." This is made clear by the following quotation from the majority opinion:

> "We agree with the appellees however, that the district judge was right in denying the relief prayed and dismissing the bill as without merit. For, in our opinion, nothing in the [renovated butter] act or regulations under it, expressly purports to prevent, or impliedly purports to exclude the state from making and enforcing like regulations with those the United States lays down, for the purity and wholesomeness of ingredients to be used in the process of manufacturing food products in Alabama for sale there and in other states."

As opposed to the novel doctrine that both the State and the United States may occupy the same field at the same time and exercise jurisdiction over the same subject matter at the same time, say we, as this Court has said:

> "Commerce cannot flourish in the midst of such embarrassment."
>
> *Hall v. DeCuir*, 95 U. S. 485.

Moreover, *this is not a case in which the State is enforcing like regulations with those the United States lays down. When it comes to raw material* the regulation the United States lays down is that the raw material must not be deleterious to health or *unwholesome in the finished product.* The respondents are attempting to make the raw material conform to the food standard—not to the raw material standard provided by Congress.

One of the errors in the majority opinion of the Circuit Court of Appeals, as we see it, is the holding that Congress must not only completely occupy the field but must expressly or impliedly exclude the State from entering the field preempted by Congress, in order to exclude action by State officers.

We have always been under the impression that when Congress completely occupies the field *the Constitution does the excluding.* We maintain that complete occupancy of the field by Congress excludes others as a matter of law without Congress saying anything about it. It is an incongruity, a repugnancy in terms to say that Congress may completely occupy a field without excluding others from the field.

How many Federal statutes contain a provision expressly preventing or impliedly excluding the State from entering a field completely occupied by Congress? We have been unable to find a single one. The Circuit Court of Appeals did not refer to any legislation of that kind. The Attorney General has not called any legislation of that kind to our attention. In the century and a half that Congress has been enacting statutes, so far as

we are advised, Congress has never expressly excluded a State from a field completely occupied by Congress.

The idea that words directly inhibitive of the exercise of State authority must be employed before the State is excluded from a field occupied by Congress has been repudiated several times if we correctly understand the decisions of this Court.

The theory of concurrent powers was advanced in the case of *Gibbon v. Ogden*, 9 Wheaton 1, in which Chief Justice Marshall, in speaking of power of Congress to regulate interstate commerce, made the following response:

> "Like all others vested in Congress (this power) is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."

Further Chief Justice Marshall stated:

> "In argument, however, it has been contended that if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the constitution, they affect the subject, and each other, like equal opposing powers.
>
> "But the framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it."

The Renovated Butter Act takes possession of the subject of raw material and the finished product. In such cases it is said:

"It is true that words directly inhibitive of the exercise of State authority are not employed, but the subject is taken possession of."

*Southern Railway Co. v. Reid*, 222 U. S. 424-442.

It may be suggested that the standard provided by Congress for determining whether raw material entering into the manufacture of renovated butter should be permitted in the channels of commerce is not as high as the respondents would have it. It may be suggested that the standard is not as high as the Secretary of Agriculture is authorized to make it. Any suggestion of that kind is fully answered in the case of *Napier vs. Atlantic Coast Line*, 272 U. S. 606. The fact that the Secretary of Agriculture has not seen fit to exercise his authority to the full extent conferred, if such be the case, has no bearing upon the construction of the Act delegating the power. If the protection now afforded by the regulations promulgated by the Secretary of Agriculture is deemed inadequate, application for relief must be made to him or to Congress. The Secretary of Agriculture's power is ample.

It may be contended that inasmuch as the Secretary of Agriculture has not gone as far as he is authorized to go by the Renovated Butter Act, the State may operate in the unoccupied portion of the field.

Such construction as that cannot be given to the Federal Statute. The obligation to act; without respect to the States, is put directly upon the Secretary of Agriculture whenever inspection in his judgment is necessary. When he does not act it must be presumed that

it is not necessary. With the Federal law in force State action is illegal and unwarranted.

*Oregon-Washington RR. Co. v. Washington*, 270 U. S. 87.

The obligation to inspect raw material and to determine whether or not it should be permitted in the channels of commerce is placed directly upon the Secretary of Agriculture without respect to the States. His duty in the premises is not measured, neither is his power affected by anything a State may or may not do.

A case that completely answers any suggestion that the State may invade even a portion of an occupied field is *North Pacific RR. Co. v. Washington*, 222 U. S. 370. There Congress passed an Hours of Service law which was to become effective one year after its passage. During the pre-effective year the State of Washington passed a State Hours of Service Law. It was claimed that the State might operate during the time the Federal Statute was not in operation.

Chief Justice White, speaking for the Court, said:

> "It is elementary, and such is the doctrine announced by the cases to which the court below referred, that the right of a State to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power. * * * To admit the fundamental principle and yet to reason that because Congress chose to make its prohibi-

tions take effect only after a year, the matter with which Congress dealt remained subject to state power, is to cause the act of Congress to destroy itself; that is, to give effect to the will of Congress as embodied in the postponing provision for the purpose of overriding and rendering ineffective the expression of the will of Congress to bring the subject within its control—a manifestation arising from the mere fact of the enactment of the statute.

To like effect are:

*L. & N. R. R. Co. v. State,* 16 Ala. App. 199, Supreme Court opinion at page 204.
*Prigg v. Pa.*, 16 Peters 539.
*Erie R. R. v. New York*, 233 U. S. 671.
*N. Y. C. R. R. v. Winfield*, 244 U. S. 147.
*Erie R. R. v. Winfield*, 244 U. S. 170.
*C. R. I. & P. R. R. v. Hardwick Co.*, 226 U. S. 426.
*Mo. Pac. Co. v. Porter*, 273 U. S. 341.
*Farmers Grain Co. v. Langer*, 273 Fed. 635.

The Circuit Court of Appeals has in effect held that the Secretary of Agriculture has decided that material used in manufacturing renovated butter in interstate commerce should not be seized, until he determines whether such material is unwholesome or deleterious to health in the finished product, and that *his decision that it should not be seized, until he so determines, leaves the respondents free to seize it before he makes the determination required by Congress.*

If the Secretary of Agriculture is willing to give the industry an opportunity to clean up packing stock butter in interstate commerce, and to manufacture a whole-

some article from it, and then label it "Renovated Butter" and sell it as such, by what right can that plan for regulation *in interstate* commerce be vetoed by respondents?

In *Prigg v. The Commonwealth* of Pa., 16 Pet. 539, it was said:

> "For, if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the State Legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it. * * *"

The record shows, and the opinion of the Court of Appeals recognizes, that the State regulations the respondents claim they are enforcing have exactly the same objective as the Renovated Butter Act and the regulations of the Secretary of Agriculture. Both are trying to accomplish the same thing.

However subtle the argument, the respondents' position is this: They claim the right as State officers to stop the movement in interstate commerce of raw material that Congress and the Secretary of Agriculture say is entitled to move. Congress says the raw material may move in interstate commerce if it is not de-

leterious to health or unwholesome in the finished product. These officers say it shall not move in interstate commerce, even though it is not deleterious to health or unwholesome in the finished product,—if it is otherwise sub-standard, even though the purpose of moving it is to bring it up to a standard. They claim the authority to prohibit, by seizure of raw material moving in interstate commerce, the manufacture of renovated butter from sub-standard raw butter for shipment and sale in interstate commerce. They do not say this in so many words but that is what they are in effect contending for. They are going far beyond any statute or regulation of the State. Everyone recognizes that raw butter may be sub-standard for any number of reasons. If it was not sub-standard it would not need renovation. Congress recognizes sub-standard raw material as a legitimate article of commerce. It recognizes the finished product as a legitimate article of commerce. If the State can stop the transportation of sub-standard raw material for renovation, that is the end of the renovated butter business as a practical proposition. The prohibition is as effective as if the State should say it shall be unlawful for any person to engage in the renovation of butter. Standard butter needs no renovation. The only raw material that can be used in the manufacture of renovated butter is raw country butter and the record in this case unquestionably shows that there is not enough raw country butter available in Alabama to meet the petitioner's requirements. (R. pp. 5 and 8.)

We are further fortified in our contention that the complete occupation of the field by Congress results in

the exclusion of the State from the field, by a well considered case by the Supreme Court of Alabama. In *State vs. Cecil,* 216 Ala. 391, the Supreme Court of Alabama expressly held that the enactment of the Alabama Agricultural Code was within the exercise of the police power of the State, but *the operation of the code was confined to intra state commerce.*

If this be true then it would seem that there is no statutory authority for the acts of the respondents complained of.

Before the respondents are authorized by the Alabama Agricultural Code to seize an article it must appear:

1. That the article seized is an article *of food* or drugs.

2. It must be adulterated or misbranded.

3. It must be manufactured for sale in Alabama, held in possession with intent to sell in Alabama, offered or exposed for sale in Alabama, or sold or delivered within Alabama. If it is not manufactured for sale or held in possession with intent to sell in Alabama, or not offered or exposed for sale in Alabama, or not sold or delivered within Alabama the Alabama Agricultural Code does not apply. *State v. Cecil, supra.*

The Record in this case refutes any claim that the packing stock butter seized in interstate commerce is an article of food. The petitioner's sole purpose in acquiring it and handling it is to work it over, clean it up and render it wholesome and safe, and after that has been accomplished, to sell and ship 90% of it in interstate commerce.

While the interstate character of the butter seized was not challenged below and was taken for granted by the Circuit Court of Appeals, the respondents intimated that they claimed a right to inspect the raw country butter moving in interstate commerce or held and used by the petitioner in interstate commerce for the purpose of manufacturing process butter, for sale and shipment in interstate commerce, because it is admitted that 10% of the finished product of petitioner's plant is distributed to consumers in Alabama through retail outlets in the State.

> "Where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation."
> *Currin v. Wallace*, 306 U. S. 10;
> *Lemke v. Farmers Grain Co.*, 258 U. S. 50.

The interstate character of the article does not cease until it has become a part of the general mass of property in the State. The fact that the raw butter may be taken from the trucks and stored in petitioner's plant and mixed with other butter acquired in Alabama for manufacture into the finished product for sale and shipment does not take away the interstate character of the raw butter being held for such purpose.

> *Stafford v. Wallace*, 258 U. S. 495-528;
> *Chicago Board of Trade v. Olsen*, 262 U. S. 1-43.
> *National Labor Board v. Jones & Laughlin*, 301 U. S. 1.

We think these authorities show that this Court has

ruled that the raw butter does not cease to be in interstate commerce because it lays over in petitioner's plant in Birmingham for a few days awaiting manufacture into a pure and finished product for sale and shipment in interstate commerce. The raw butter is all the while in the channel of interstate commerce. The petitioner's plant in Birmingham, in such circumstances, is merely a conduit through which interstate commerce flows.

Where intrastate and interstate transactions are necessarily commingled and are so related that the government of the one involves control of the other it is Congress and not the State that is entitled to prescribe the final and dominant rule.

*Currin v. Wallace*, 306 U. S. 1-18;
*Minnesota Rate cases*, 230 U. S. 352;
*Second Employers Liability Cases*, 223 U. S. 1.

Where interstate and intrastate operations are necessarily indivisible, and the interstate operations are the dominant operations, the business must be considered as engaged in interstate commerce.

*U. S. v. Darby Lbr. Co.*, 61 Sup. Ct. 451;
*Grandin Farmers Coop. Elevator Co. v. Langer*, 292 U. S. 605;
*Shaffer v. Farmers Grain Co.*, 268 U. S. 190;
*Lemke v. Farmers Grain Co.*, 258 U. S. 50;
*Currin v. Wallace*, 306 U. S. 1.

In determining what is interstate commerce the court looks to practical situations and the established course of business.

*Foster Fountain Pkg. Co. v. Haydell*, 278 U. S. 1.

## THE CASES CITED IN MAJORITY OPINION

The Circuit Court of Appeals cited *Mintz v. Baldwin*, 289 U. S. 346 and some other cases on page 232 of the opinion in the Federal Reporter. We earnestly insist that the cases cited have been misinterpreted and misapplied. We will comment on the cases in the following order:

**Mintz v. Baldwin, 289 U. S. 346:**

Suit to restrain State enforcing regulation prohibiting the importation of cattle into New York unless the cattle and the herds from which they came were certified free from Bang's disease by the chief sanitary official of the State of origin.

> "Plaintiff shipped 20 head from Wisconsin for delivery to one Bartlett in New York. The animals were accompanied by a certificate which was sufficient as to them, but there was nothing to show the freedom from Bang's disease of the herd or herds from which they came. For that reason defendant refused to permit them to be delivered, and so plaintiffs were compelled to take them out of New York." (Page 348.)
>
> "The Federal Department of Agriculture, November 15, 1932, by letter to defendant declared that the *Department had issued no quarantine or regulation pertaining to Bang's disease and that its policy for the present is to leave the control with the various States.*" (Italics supplied.) (Page 349.)

"Whenever any inspector or assistant inspector of the Bureau of Animal Industry shall issue a certificate showing that such officer had inspected any cattle which were about to be shipped * * * from such locality * * * and had found them free from * * * communicable disease, such animals, so inspected and certified, may be shipped, driven, or transported from such place in interstate commerce without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture. * * *" (Pp. 350-351.)

"The express exclusion of State inspection extends only to cases where Federal inspection has been made and certificate issued. The clause cannot be read to extend to other cases. The expression of purpose so to limit the exertion of State power strongly suggests that Congress intended not otherwise to trammel the enforcement of state quarantine measures." (Page 351.)

The difference between the "Railroad Cases" and the *Mintz v. Baldwin* case is striking. In *Mintz v. Baldwin* the Government had issued no quarantine or regulation pertaining to Bangs disease and a governmental department official advised the State that it was the policy of the Government to leave the control of Bangs disease with the various States (pages 349.) Moreover, *the legislation itself* excluded State inspection *only* in cases where Federal inspection had been made and a certificate issued by the Federal inspector. That was a provision in the legislation there under review. The cattle involved were not inspected by a Federal inspector and no certificate was issued under Federal authority. No

certificate having been issued by the Federal inspector, the cattle involved were not under the protection of the Federal law, by the terms of the law itself. It is strongly implied in *Mintz v. Baldwin* that had a certificate been issued the State could not have interfered.

In *Mintz v. Baldwin*, it was optional with the cattle owner whether he would have his cattle inspected by a Federal inspector and obtain the certificate authorized by law in such cases. In the case at bar it is not optional with the petitioner as to whether the Secretary of Agriculture will inspect the raw material. The Secretary of Agriculture is required to perform that duty and to make the examination and finding required by statute, and to him is committed the sole responsibility for determining the suitability of the raw material for conversion into renovated butter for sale and shipment in interstate commerce.

If it be claimed that any particular lot of raw material seized by the respondents was not actually inspected by the Secretary of Agriculture prior to its seizure, that fact is no evidence that the Secretary of Agriculture would not have passed on the raw material *in due time*. Respondents stopped the truck from Georgia before the Secretary of Agriculture had any opportunity to act.

The respondents say that the *Mintz* case is to be distinguished from the *Napier* case and like cases because it was stated in the *Mintz* case that:

> "The purpose of Congress to supersede or exclude State action against the ravages of disease is not lightly to be inferred. The intention so to do must definitely and clearly appear."

We have been unable to find any authority intimating that the purpose of Congress to supersede or exclude State action against the ravages of disease must more definitely and clearly appear than the purpose of Congress to supersede or exclude State action against the seizure of a legitimate article of commerce moving in the stream of interstate commerce. The makers of the Constitution of the United States had a purpose and that purpose was to exclude the State from the seizure of a legitimate article of commerce moving in the stream of interstate commerce.

**Pacific States Co. v. White, 296 U. S. 176:**

Suit to enjoin State order prescribing standards for containers in which berries were marketed.

> "*The standard prescribed by the order does not conflict with any established by Congress.* The Standard Baskets and Containers Act of May 21, 1928, c. 664, 45 Stat. 685, has no relation to the matter here under consideration. That statute deals solely with hampers, round stave, and splint baskets of capacity not less than one-eighth bushel. The Standard Baskets and Containers Act of August 31, 1916, c. 426, 39 Stat. 673, which in Sec. 2 deals with containers for small fruits and vegetables, prescribes merely the capacity of the containers. It fixes the cubic feet contents for dry half-pint, pint and quart. It makes no reference to the dimensions or form of the container; and has left to the individual States the adoption of the standards in these respects if deemed necessary." (Page 182-183.)

**Kelly v. Washington, 302 U. S. 1:**

"Respondents, owners of motor-driven tugs, sought a writ of prohibition to prevent the enforcement of provisions of c. 200 of the Washington Laws of 1907 (Rem. Rev. Stat., Secs. 9843 et seq.) relating to the inspection and regulation of vessels. (Page 2-3.)

* * * * * *

*"There is no constitutional rule which compels Congress to occupy the whole field.* Congress may circumscribe its regulation and occupy only a limited field. When it does so, State regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid, if not superseded by Federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' (Page 10.)

* * * * * *

*"In the instant case, in relation to the inspection of the hull and machinery of respondents' tugs, the State law touches that which the Federal laws and regulations have left untouched.* (Page 13.)

* * * * * *

"We have found that in relation to the inspection of the hull and machinery of these tugs, in order to insure safety and seaworthiness, there is a field in which the State law could operate without coming into conflict with present Federal laws." (Page 15.)

Which very clearly shows that the subject was not completely covered by Federal laws and regulations.

**S. C. Highway Dept. v. Barnwell Bros., 303 U. S. 177:**

Suit to enjoin State officers from enforcing State statute limiting weight and width of trucks on public roads while engaged in interstate commerce.

> "Appellees do not challenge here the ruling of the district court that *Congress has not undertaken to regulate the weight and size of motor vehicles in interstate motor traffic*, and has left undisturbed whatever authority in that regard the States have retained under the Constitution. (Page 184.)
>
> "But the present case affords no occasion for saying that the bare possession of power by Congress to regulate the interstate traffic forces the State to conform to standards which Congress might, but has not adopted, or curtails their power to take measures to insure the safety and conservation of their highways which may be applied to like traffic moving intrastate." (Page 187.)

These quotations make it clear that the case turned on the proposition that Congress had not acted on the subject involved.

**Currin v. Wallace, 306 U. S. 1:**

Suit to declare Tobacco Inspection Act unconstitutional. It was claimed it was a regulation of intrastate commerce.

> "The Act states its scope and purpose. Sections 1, 2. It applies to transactions involving the sale

of tobacco at auction as commonly conducted at auction markets. These transactions are carried on by tobacco producers and by persons engaged in the business of buying and selling tobacco in commerce as defined, that is, in commerce which is interstate or foreign or is with or within the Territories or the District of Columbia. Congress finds that the classification of tobacco according to type, grade, and other characteristics affects the prices received; that 'without uniform standards of classification and inspection the evaluation of tobacco is susceptible to speculation, manipulation and control,' and 'unreasonable fluctuations in prices and quality discriminations occur,' constituting a burden upon commerce; and that the use of uniform standards is imperative 'for the protection of producers and others engaged in commerce and the public interest therein.' (Page 5-6.)

* * * * * * *

"Under the operation of the Act Federal inspectors examine the tobacco about an hour before the sale. They pull samples from each pile and place tickets indicating the grade. Each day there is displayed in the warehouse a report indicating the average price for the government grades sold on the previous day and weekly reports are issued for the preceding week. (Page 8.)

* * * * * * *

"Inspection and the establishment of standards for commodities has been regarded from colonial days as appropriate to the regulation of trade, and the authority of the States to enact inspection laws is recognized by the Constitution. Art 1, Sec. 10,

par. 2. See Turner v. Maryland, 107 U. S. 38, 51-54; Pacific States Co. v. White, 296 U. S. 176, 181. *But the inspection laws of a State relating to exports or to articles purchased for shipment to other States are subject to the paramount regulatory power of Congress.*" (Page 12.) (Emphasis supplied.)

This case supports the contention of Appellant. It was there held that the tobacco involved was in interstate commerce and congressional action respecting it was paramount.

**Townsend v. Yeomans, 301 U. S. 454:**

Suit to restrain the enforcement of a statute of Georgia fixing maximum charges for handling and selling leaf tobacco.

"The statute was assailed as an arbitrary and capricious exercise of State power, repugnant to the Fourteenth Amendment of the Federal Constitution, and as placing a direct burden upon interstate commerce in violation of the commerce clause." (Page 443.)

"Unless there is conflict with the authority of the Congress over interstate commerce, the enactment of the statute was clearly within the competency of the Georgia legislature. (Page 449.)

"The main contention of appellants is that the State had no power to enact the regulation as it attempted to govern transactions in the course of interstate and foreign commerce. (Page 452.)

"We find it unnecessary to pass upon the authority of the Congress to regulate the charges of warehousemen, for we are of the opinion that, if it be assumed that Congress has that authority, *it has*

*not been exercised and in the absence of such exercise the State may impose* the regulation in question for the protection of its people. (Page 452.) (Emphasis supplied.)

"The State is entitled to afford its industry this measure of protection until its requirement is superseded by valid Federal regulation." (Page 459.)

*This case turns on the proposition that Congress had not exercised its authority.*

In this connection we submit it is not necessary for the Federal Government to seize packing stock butter in order to exercise jurisdiction over it. If the Government requires inspection and prescribes a method by which it may be ascertained whether the packing stock butter measures up to a given standard, that, we submit, is as much an exercise of jurisdiction over packing stock butter as is a seizure of the butter itself.

We know of no authority holding that the State may duplicate the work of the Federal Government by the exercise of authority in a field occupied by Congress that Congress itself does not deem it necessary to exercise.

It is not necessary for the petitioner to show that the Federal Government has actually inspected and passed the particular products the State seized. It is only necessary for the petitioner to show that the Federal Government has provided a standard to which the raw material must conform and has made it the duty of a particular officer to see to it that the raw material conforms to the standard prescribed by Congress. When

it is shown that the Federal Government has prescribed a standard for the product seized, and that it has required the Secretary of Agriculture to ascertain and determine whether or not the material meets the standard prescribed by Congress, any further State action is excluded. It is not a question of whether the Secretary of Agriculture has acted. The question is, does he have the power to act? Is it his duty to act? If so that is the end of the inquiry.

The compliance-defiance test announced in the majority opinion is not compatible with the paramount power of Congress over interstate commerce. The compliance-defiance test was rejected in *Erie R. R. Co. vs. New York*, 233 U. S. 671, on the ground that it was not compatible with the paramount power of Congress over interstate commerce. The New York Court of Appeals attempted to sustain the legislation there involved because it found that:

> "The State has simply supplemented the action of the Federal authorities * * * and the form of the Federal statute * * * fairly seems to have invited and to have left the subject open for supplemental State legislation if necessary."

But this Court said:

> "It (the Federal Statute) admits of no supplement: *it is the prescribed measure* of what is necessary and sufficient for the public safety."

That language applies with peculiar force to the renovated butter statutes and the rigid regulations relating

to its manufacture. The condition of the finished product is the prescribed measure of what is necessary and sufficient for the public safety.

Again, in *Southern R. Co. v. Railroad Commission*, 236 U. S. 439, it was said:

> "If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the State legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. *In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter.* * * *
>
> "When the question is whether a Federal act overrides a State law, the entire scheme of the statute must, of course, be considered, *and that which needs must be implied is of no less force than that which is expressed.* If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—*the State law must yield to the regulation of Congress within the sphere of its delegated power.* Savage v. Jones, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182." (Emphasis supplied.)

In our headlight case, in which compliance with one was not defiance of the other, *L. & N. R. R. Co. v. State*, 16 Ala. App. at page 202, it was said:

"When we come to consider whether or not two powers—one superior and the other of inferior jurisdiction—occupy the same field, it would seem proper that any reasonable doubt, if such there is, should be resolved in favor of the superior jurisdiction."

The "compliance-defiance" test was also rejected in the *Napier* case, 272 U. S. 606 on pages 612-613, where the court said:

"The argument mainly urged by the States in support of the claim that Congress has not occupied the entire field, is that the Federal and State laws are aimed at distinct and different evils; that the Federal regulation endeavors solely to prevent accidental injury in the operation of trains, whereas the State regulation endeavors to prevent sickness and disease due to excessive and unnecessary exposure; and that whether Congress has entered a field must be determined by the object sought through the legislation, rather than the physical elements affected by it. Did Congress intend that there might still be State regulation of locomotives, if the measure was directed primarily to the promotion of health and comfort and affected safety, if at all, only incidentally?

"The Federal and the State statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the Commission has been exerted only in respect to minor changes or additions. But, this, if true, is not of legal significance. It is also urged that, even if the Commission has power to prescribe an automatic firebox door and a cab curtain, it has not done so; and that

it has made no other requirement inconsistent with the State legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power."

The same test was rejected in *Oregon-Washington R. R. Co. v. Washington*, 270 U. S. 87 on pages 101-102, in the following language:

"The act we are considering is very different. It makes no reference whatever to cooperation with State authorities.

* * * * * *

"It follows that, pending the existing legislation of Congress as to quarantine of diseased trees and plants in interstate commerce, the statute of Washington on the subject can not be given application. It is suggested that the States may act in the absence of any action by the Secretary of Agriculture; that it is left to him to allow the States to quarantine, and that if he does not act there is no invalidity in the State action. Such construction as that can not be given to the Federal statute. The obligation to act without respect to the States is put directly upon the Secretary of Agriculture whenever quarantine, in his judgment, is necessary. When he does not act, it must be presumed that it is not necessary. With the Federal law in force, State action is illegal and unwarranted."

The "compliance-defiance" test was rejected in *Missouri Pacific R. R. Co. v. Stroud*, 267 U. S. 404, which

was a suit to recover damages under Sections 9985, 9990, Revised Statutes of Missouri, 1919, which read:

> "'It shall be unlawful for any such common carrier to make or give any undue or unreasonable preference or advantage to any particular person * * * in the transportation of goods * * * or to subject any particular person * * * to any undue or unreasonable prejudice or disadvantage with respect to such transportation * * *' Section 9990, among others things, makes the carrier liable to any person injured by a violation of the above quoted provision for three times the amount of damages sustained."

Section 3 of the Interstate Commerce Act reads:

> "'That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or for any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The State statute in effect duplicated the right of action provided by the Federal law.

The court said:

> *"It is elementary and well settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive. * * * The State law has no*

*application to the furnishing of cars to shippers for the transportation of freight in interstate commerce"*
*Missouri Pacific R. R. Co. v. Stroud*, 267 U. S. 408.

The "compliance-defiance" test is merely an illustration of extreme cases, in which it is self-evident that a State enactment cannot stand because of its irreconcilable conflict with a Federal law. But there are many instances in which the owner of property in interstate commerce might comply with both regulations—cases in which compliance with one would not be defiance of the other—in which the Supreme Court of the United States has declined to subject the article in interstate commerce to *double regulation*.

Take the steamboat case, for instance (*Sinnot v. Davenport*, 63 U. S. 227): There the owner of the boat might well have filed the information in the Probate Office at Mobile, as the State law required, as well as with the collectors as the Federal law required. The case, as we understand it, turns on the proposition that Congress had legislated on the "very subject" which the State act undertook to regulate.

The regulation of interstate commerce is so intimately blended and intertwined with responsibilities of the National Government that where it acts, and the State also acts on the same subject, the Act of Congress is supreme and the law of the State, though enacted in the exercise of powers not controverted, must yield to it, and where the Federal Government in the exercise of its superior authority in this field has enacted a complete scheme of regulation and has therein provided a

standard for packing stock butter the State cannot conflict or interfere with, curtail or complement Federal law or enforce additional or auxiliary regulations. This contention is supported by the late case of *Hines v. Davidowitz*, 61 Sup. Ct. Rep. 399-403, where the rule was applied with reference to legislation affecting aliens. The power of Congress to regulate interstate commerce is certainly as broad as its power to legislate with respect to aliens.

In *Truax v. Raich*, 239 U. S. 33-42, Raich, an alien, brought an action against Truax and others to restrain the enforcement of a state statute requiring employers of more than five workers to employ not less than eighty per cent qualified electors or native born citizens. In declaring the statute unconstitutional the Court said:

> "The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. *Fong Yue Ting v. United States*, 149 U. S. 698, 713. The assertion *of an* authority to deny aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work."

This case seems to support the proposition that since Congress prescribed a standard for materials in interstate commerce used in the manufacture of renovated butter, it is not permissible for the State or state officers to provide another standard, even though the standard so provided is identical with the standard provided by Congress.

The Renovated Butter Act is plainly a health measure. The revenue feature is incidental. Any contention that the Renovated Butter Act is a revenue measure and not intended as a regulation of commerce ignores a material part of the title of the Act which is "and to regulate the manufacture and sale of certain dairy products." It ignores Section 2325 I. R. C. which authorizes and requires the Secretary of Agriculture to cause a rigid sanitary inspection to be made of the materials going into the manufacture of renovated butter.

*Is a rigid sanitary inspection a revenue measure?*

The contention also ignores Regulations 4, Section 1. Regulation 1, Sections 1 and 2 which require rigid sanitary inspection to be made of materials going into the manufacture of process or renovated butter and provide how the samples shall be drawn in order to determine whether or not materials used in the manufacture of renovated butter are deleterious to health or unwholesome in the finished product.

The contention also ignores *United States vs. Bohl*, 125 Fed. 625, where it was said:

> *"Other provisions of the (Renovated Butter) Act in question may gain their efficacy from the taxing clause of the Constitution, but Section 5 goes to the commerce clause as the fountain whence its vigor springs."* (Italics supplied.)

Section 5 referred to in the preceding quotation is the section in the act requiring the Secretary of Agriculture to cause a rigid sanitary inspection to be made of the

materials going into the manufacture of renovated butter. It is now Section 2325, I. R. C.

## CONCLUSION

Congress says material to be used in the manufacture of renovated butter may move in interstate commerce as long as it is not unwholesome or deleterious to health *in the finished product.* And the U. S. Secretary of Agriculture will determine that.

The respondents say, No! It shall not move, even though not unwholesome or deleterious to health in the finished product, if it is sub-standard *by our standard*—and we will determine that.

It is respectfully submitted that the judgment and decision of the Circuit Court of Appeals for the Fifth Circuit should be reversed and the cause remanded.

HORACE C. WILKINSON,
EARLE PETTUS,
VICTOR H. SMITH,
*Counsel for Petitioner.*

# APPENDIX

---

FEDERAL STATUTES

FEDERAL REGULATIONS

STATE STATUTES

## FEDERAL STATUTES

I. R. C. Sec. 2320-2327,
USCA, Title 26, Sections 990-996:
"Sec. 990. DEFINITIONS.

"(a) BUTTER. For the purpose of this chapter and sections 1366, and 1367, the word 'butter' shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter.

"(b) ADULTERATED BUTTER. 'Adulterated butter' is defined to mean a grade of butter produced by mixing, reworking, rechurning in milk or cream, refining, or in any way producing a uniform, purified, or improved product from different lots or parcels of melted or unmelted butter or butter fat, in which any acid, alkali, chemical, or any substance whatever is introduced or used for the purpose or with the effect of deodorizing or removing therefrom rancidity, or any butter or butter fat, with which there is mixed any substance foreign to butter as defined in subsection (a), with intent or effect of cheapening in cost the product of any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk, or cream.

"(c) PROCESS OR RENOVATED BUTTER. 'Process butter' or 'revonated butter' is defined to mean butter which has been subjected to any process by which it is melted, clarified or refined and made to resemble genuine butter, always excepting 'adulterated butter' as defined by subsection (b).

"Sec. 991. TAX.

"(a) RATE—(1) ADULTERATED BUTTER. Upon adulterated butter, when manufactured or sold or removed for consumption or use, there shall be as-

sessed and collected a tax of 10 cents per pound, and any fractional part of a pound shall be taxed as a pound. (May 9, 1902, c.)

"(2) PROCESS OR RENOVATED BUTTED. Upon process or renovated butter, when manufactured or sold or removed for consumption or use, there shall be assessed and collected a tax of one-fourth of 1 cent per pound, and any fractional part of a pound shall be taxed as a pound.

"(b) BY WHOM PAID. The tax to be levied by subsection (a) shall be paid by the manufacturer.

"(c) HOW PAID—(1) STAMPS. The tax to be levied by subsection (a) shall be represented by coupon stamps.

"Sec. 992. MANUFACTURERS.

"(a) DEFINITION. Every person who engages in the production of process or renovated butter or adulterated butter as a business shall be considered to be a manufacturer thereof.

"(b) PACKING, STAMPING, AND SELLING REQUIREMENTS—(1) ADULTERATED BUTTER. All adulterated butter shall be packed by the manufacturer thereof in firkins, tubs, or other wooden, tin-plate, or paper packages not before used for that purpose, containing, or encased in a manufacturer's package made from any of such materials of, not less than ten pounds, and marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, and all sales made by manufacturers of adulterated butter shall be in original, stamped packages. Every manufacturer of adulterated butter shall securely affix, by pasting, on each package containing adulterated butter manufactured by him a label on which shall be printed, besides the number of the manufactory and the district and State in which it is situated, these words:

"'Notice.—That the manufacturer of the adulterated

butter herein contained has complied with all the requirements of law. Every person is cautioned not to use either this package again or the stamp thereon, nor to remove the contents of this package without destroying said stamp, under the penalty provided by law in such cases.'

"(c) BOOKS AND RETURNS. Every manufacturer of process or renovated butter or adulterated butter shall file with the collector of the district in which his manufactory is located such notices and inventories, shall keep such books and render such returns of material and products, and conduct his business under such surveillance of officers and agents as the Commissioner, with the approval of the Secretary, may by regulation require.

"(d) FACTORY NUMBER AND SIGNS. Every manufacturer of process or renovated butter or adulterated butter shall put up such signs and affix such number to his factory as the Commissioner, with the approval of the Secretary, may by regulation require.

"(e) BONDS. Every manufacturer of process or renovated butter shall file with the collector of the district in which his manufactory is located such bonds as the Commissioner, with the approval of the Secretary, may by regulation require. But the bond required of such manufacturer shall be with sureties satisfactory to the collector and in a penal sum of not less than $500; and the sum of said bond may be increased from time to time and additional securities required at the discretion of the collector or under instructions of the Commissioner.

"SEC. 993. DEALERS IN ADULTERATED BUTTER.

"(a) DEALER DEFINED. Every person who sells adulterated butter shall be regarded as a dealer in adulterated butter.

"(b) RETAIL DEALER DEFINED. Every per-

son who sells adulterated butter in less quantities than ten pounds at one time shall be regarded as a retail dealer in adulterated butter.

"(c) SELLING REQUIREMENTS. Dealers in adulterated butter must sell only original or from original stamped packages, and when such original stamped packages are broken the adulterated butter sold from same shall be placed in suitable wooden, tinplate, or paper packages, which shall be marked and branded as the Commissioner, with the approval of the Secretary, shall prescribe.

"Sec. 994. BOOKS AND RETURNS OF WHOLESALE DEALERS IN ADULTERATED AND PROCESS OR RENOVATED BUTTER. Wholesale dealers in process, renovated, or adulterated butter shall keep such books and render such returns in relation thereto as the Commissioner, with the approval of the Secretary, may, by regulation, require; and such books shall be open at all times to the inspection of any internal revenue officer or agent.

"Sec. 995. INSPECTION, MANUFACTURE, STORAGE, AND MARKING OF PROCESS OR RENOVATED BUTTER.

"The Secretary of Agriculture is authorized and required to cause a rigid sanitary inspection to be made at such times as he may deem proper or necessary, of all factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market and of the products thereof and materials going into the manufacture of the same. All process or renovated butter and the packages containing the same shall be marked with the words 'Renovated Butter' or 'Process Butter' and by such other marks, labels, or brands and in such manner as may be prescribed by the Secretary of Agriculture, and no process or renovated butter shall be shipped or transported from its place of manufacture into any other State or Territory or the District of

Columbia, or to any foreign country, until it has been marked as provided in this section. The Secretary of Agriculture shall make all needful regulations for carrying this section and sections 996(c) and 997(b) into effect and shall cause to be ascertained and reported from time to time the quantity and quality of process or renovated butter manufactured, and the character and condition of the material from which it is made. And he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States or in course of exportation or shipment he shall have power to confiscate the same.

"Sec. 996. PENALTIES.

"(a) ADULTERATED BUTTER—(1) FALSE BRANDING; SALE, PACKING, OR STAMPING IN VIOLATION OF LAW. Every person who knowingly sells or offers for sale, or delivers or offers to deliver any adulterated butter in any form than in new wooden or paper packages as described in subsection (c) of section 993, or who packs in any package any adulterated butter in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law, shall be fined for each offense not more than $1,000 and be imprisoned not more than two years.

"(2) OMISSION OR REMOVAL OF LABEL. Every manufacturer of adulterated butter who neglects to affix the label required under paragraph (1) of subsection (b) of section 992 to any package containing adulterated butter made by him, or sold or offered for sale for or by him, and every person who removes any such label so affixed from any such package shall be

fined $50 for each package in respect to which such offense is committed.

"(b) FAILURE OF WHOLESALE DEALERS TO KEEP OR PERMIT INSPECTION OF BOOKS, OR TO RENDER RETURNS. Any person who willfully violates any of the provisions of section 994 shall for each such offense be fined not less than $50 and not exceeding $500, and be imprisoned not less than thirty days nor more than six months.

"(c) FAILURE TO COMPLY WITH PROVISIONS RELATING TO THE MANUFACTURE, STORAGE, AND MARKING OF PROCESS OR RENOVATED BUTTER. Any person, firm or corporation violating any of the provisions of section 995 shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than $50 nor more than $500 or by imprisonment not less than one month nor more than six months, or by both said punishments, in the discretion of the court."

B. D. I. Order No. 1—Revised

Issued December 24, 1936

UNITED STATES DEPARTMENT OF AGRICULTURE

BUREAU OF DAIRY INDUSTRY

# REGULATIONS FOR CARRYING INTO EFFECT THE PROCESS OR RENOVATED BUTTER ACT.

## INTRODUCTION

Under authority conferred upon the Secretary of Agriculture by the act of Congress approved May 9, 1902, entitled "An act to make oleomargarine and other imitation dairy products subject to the laws of any state, or territory, or the District of Columbia, into which they are transported, and to change the tax on oleomargarine, and to impose a tax, provide for the inspection, and regulate the manufacture and sale of certain dairy products, and to amend an act entitled 'An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine approved August 2, 1886'" (32 Stat. 193-197; U. S. C., title 26, sec. 990-997); and by the act of Congress approved August 10, 1912, entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1913" (37 Stat. 273); the following regulations are made and are hereby promulgated, which for purposes of identification are designated B. D. I. Order No. 1—Revised, superseding S. R. A. 1—Bureau Dairying, issued April, 1925; and B. D. Order 1, issued February 14, 1925; which are hereby revoked.

HENRY A. WALLACE,
*Secretary of Agriculture.*

Washington, D. C., December 24, 1936.

*Regulation 1.—Short Title of Act*

For the purpose of these regulations the act entitled "An act to make oleomargarine and other imitation dairy products subject to the laws of any State or Territory or the District of Columbia into which they are transported, and to change the tax on oleomargarine and to impose a tax, provide for the inspection, and regulate the manufacture and sale of certain dairy products, and to amend an act entitled 'An Act Defining Butter,' also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine approved August 2, 1886," approved May 9, 1902 (32 Stat. 193-199; U. S. C., title 26, sec. 990-997, as amended by the act of August 10, 1912 (37 Stat. 273, U. S. C., title 26, sec. 997 (c), entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1913," shall be known and referred to as the Process or Renovated Butter Act. The Chief of the Bureau of Dairy Industry is charged, under the direction of the Secretary, with the administration of these regulations.

*Regulation 2.—Definitions*

For the purpose of these regulations the following words, phrases, names, and terms shall be construed, respectively, to mean:

Section 1. *The Meat Inspection Act.*—The act of June 30, 1906, entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, nineteen hundred and seven" (34 Stat. 674-679) as reenacted by act of March 4, 1907 (34 Stat. 1260-1265; U. S. C., title 21, secs. 71 to 94), entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June

thirtieth, nineteen hundred and eight," the sanitary provisions of which are made applicable to renovated-butter factories by act of Aug. 10, 1912 (37 Stat. 273; U. S. C., titles 26, sec. 997 (c), entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1913."

Sec. 2. *Department.*—The United States Department of Agriculture.

Sec. 3. *Bureau.*—The Bureau of Dairy Industry of the United States Department of Agriculture.

Sec. 4. *Chief of Bureau.*—The administrative head of the Bureau of Dairy Industry of the United States Department of Agriculture.

Sec. 5. *Inspector.*—Any Department officer or employee authorized to perform any duties in connection with the administration of these regulations.

Sec. 6. *Person.*—Natural persons, individuals, firms, partnerships, corporations, companies, societies, and associations, and agent, broker, officer, employee, or member thereof. This term shall import both the plural and and the singular as the case may be.

Sec. 7. *Butter.*—The food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter.

Sec. 8. *Par.* 1.—*Process or renovated butter.*—Butter which has been subjected to any process by which it is melted, clarified, or refined and made to resemble genuine butter, always excepting adulterated butter as defined in section 4 of the act of May 9, 1902 (32 Stat. 195).

*Par.* 2. Process or renovated butter must contain at least 80 per cent by weight of milk fat.

*Par.* 3. The term "process butter" and "renovated butter" are used synonymously and it is immaterial whether a manufacturer designates the product "process butter" or "renovated butter."

*Regulation 3. — Sanitation and Sanitary Inspection of Process or Renovated Butter Factories*

Section 1. For the purpose of effectively administering the Process or Renovated Butter Act, rigid sanitary inspections will be made at such times and as often as necessary of all process or renovated butter factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market.

Sec. 2. Inspectors shall have access at all times by day or night to every part of any process or renovated butter factory or storehouse.

Sec. 3. Process or renovated butter factories or storehouses where process or renovated butter is manufactured, packed, prepared, or handled shall be maintained in a sanitary condition, and to this end the requirements of sections 4 to 12 of this regulation shall be complied with.

Sec. 4. Factories where process or renovated butter is manufactured, packed, or prepared for market shall be suitably lighted, screened, and ventilated in order that sanitary conditions may be maintained. Such factories shall be supplied with proper and sufficient drainage, having proper traps or other approved sewer connections. Rooms shall be kept reasonably free from steam and other vapors by heating or proper ventilation, and all work in such factories shall be performed in a sanitary manner.

Sec. 5. All floors, ceilings, walls, pillars, partitions, platforms, stairways, etc., shall be kept in a sanitary condition and when necessary shall be scraped, washed, painted, or otherwise treated as required. Where floors or other parts of the building, or tables or other parts of the equipment, are so old or in such poor condition that they cannot readily be made sanitary, they shall be removed and replaced with suitable material. Walks,

platforms, and approaches leading into factories shall be kept clean.

Sec. 6. All churns, melting tanks, workers, cans, vats, blowing tanks, settling tanks, trucks, trays and other receptacles, chutes, platforms, racks, tables, and all utensils, machinery, and other equipment used in preparing, moving, cutting, chopping, and otherwise handling the materials used in the manufacture of process or renovated butter, and in all processes of manufacturing of process or renovated butter or its preparation for market, shall be kept in a sanitary condition.

Sec. 7. All factories in which milk, cream, or mixtures containing milk or cream are pumped or conducted through pipes shall be equipped with sanitary pumps, pipes, and fittings. Pumps shall be so constructed that all parts coming in contact with milk, cream, or mixtures containing milk or cream shall be made of noncorrosive metal, or shall be suitably nickled, tinned, or coated with other approved metal, and such parts shall be accessible for cleaning. Pipes shall have smooth outer and inner surfaces coated with nickel, tin, or other approved metal, and fittings shall have smooth outer and inner surfaces coated with nickel, tin, or other approved metal, and shall be of such design that no pockets or recesses occur on the inside between the pipes and fittings: *Provided, however,* That open conductors having smooth outer and inner surfaces coated with nickel, tin, or other approved metal may be used in place of pipe. All pumps, fittings, and conductors shall be kept in a sanitary condition.

Sec. 8. Managers of process or renovated butter factories shall require employees to be cleanly. Aprons, smocks, and other outer clothing worn by employees who handle or in any way come in contact with the process or renovated butter or any ingredient entering into the manufacture of same shall be of material that can be made sanitary by washing, and only clean garments

shall be worn. All persons who handle process or renovated butter or any material entering into the manufacture of same shall be required to keep their hands clean, and they shall be required also to pay particular attention to the cleanliness of their boots and shoes.

Sec. 9. No person affected with tuberculosis or other communicable disease shall be employed in any factory where process or renovated butter is manufactured, and any employees who may be suspected of being so affected shall be reported by the inspector to the manager of the factory and to the Chief of Bureau.

Sec. 10. All water closets, toilet rooms, and dressing rooms shall be entirely separated from the compartments in which process or renovated butter is manufactured, prepared, packed, stored, or otherwise handled; and where such rooms open into compartments in which process or renovated butter is handled they shall be provided with properly ventilated vestibules and automatically closing doors. They shall be conveniently located, sufficient in number, ample in size, and fitted with modern lavatory accommodations including toilet paper, soap, running hot and cold water, etc., and shall be properly lighted, suitably ventilated, and kept clean and sanitary.

Sec. 11. The factory in which process or renovated butter is manufactured, prepared, packed, stored, or otherwise handled shall be kept free from odors coming from poultry rooms, egg rooms, toilet rooms, catch basins, or any other objectionable source, and shall be kept free from flies and other vermin; and all rooms or compartments shall be provided with cuspidors so designed as to prevent them from being upset, and made of such material and construction as to be readily disinfected, and employees who expectorate shall be required to use them.

*Regulation 4.—Sanitation and Sanitary Inspection of Products of and Material From Which Process or Renovated Butter is Manufactured*

Section 1. "Rigid" sanitary inspections will also be made of the character and condition of the materials going into the manufacture of process or renovated butter and of the quantity and quality of process or renovated butter manufactured.

Sec. 2. Due care must be taken to prevent process or renovated butter, in any stage of its manufacture, from falling on the floor, and in the event of its having so fallen, the soiled portion shall not be used. Butterfat collected from floors, drains, or catch basins shall not be used in the manufacture of process or renovated butter.

Sec. 3. Only good, clean, and wholesome water and ice shall be used in the preparation and manufacture of process or renovated butter and, whenever there is any doubt regarding the purity of the water supply, the facts shall be reported to the Chief of Bureau.

Sec. 4. Air used in blowing or aerating the oil during the process of manufacture shall be pure and clean, and shall be taken from the outside of the building; and in order to prevent the use of air which is contaminated with dust, smoke, objectionable odors, etc., some approved method of purification, such as washing or filtering through cotton, shall be provided.

Sec. 5. In manufacturing process or renovated butter all cream, milk or skim milk used must be pasteurized.

Sec. 6. All milk, skim milk, dried milk, dried skim milk, cream, and analogous substances used in the making of process or renovated butter shall be kept, stored, and handled in a sanitary manner in accordance with accepted dairy practices.

Sec. 7. All other materials including salt and butter color entering into the manufacture of process or renovated butter shall also be kept, stored, and handled in a sanitary manner.

Sec. 8. All cartons, parchment wrappers, liners, packages, tubs, cans, tins, or other containers used for packing process or renovated butter shall be stored, kept, and handled in a sanitary manner.

*Regulation 5.—The Marking, Labeling and Branding of Process or Renovated Butter*

Section 1. (a) Before removal from the factory each package of process or renovated butter shall have legibly printed or stenciled on one of its sides the legend "Process Butter" or "Renovated Butter"; also the factory number, district, and State. and the net weight, in the following manner:

PROCESS BUTTER
Factory No. 2, 2d Dist. New York
Net Weight, 60 lbs.

(b) The legend "Process Butter" or "Renovated Butter" shall be in boldface gothic letters not less than three-quarters of an inch square and the other words and figures not less than half an inch square. The color of the legend shall be in strong contrast to that of the package.

Sec. 2. The wrappers, cartons, or other containers in which prints or rolls are placed shall be branded with the legend "Process Butter" or "Renovated Butter" in boldface gothic letters, not less than three-eights of an inch square. Such legend shall form a strong contrast to the color of the wrapper or container. No other marks shall be made on the side of wrapper or container on which the legend is placed.

Sec. 3. Each package must show the manufacturer's name and address or the factory number, district, and State, and bear a plain and conspicuous statement of the net weight of contents. Such wrappers, cartons, or other containers shall bear no pictorial or other representation which may create the impression that the article is butter as defined by the act of Congress of March 4, 1923.

Sec. 4. The top surface of solid-packed goods shall be imprinted with the legend "Process Butter" or "Renovated Butter" in plain gothic letters not less than half an inch square, and impressed at least an eighth of an inch deep. Prints and rolls shall be similarly impressed with letters not less than three-eighths of an inch square. The surface impression may be omitted from prints and rolls of less than a pound unit weight, provided there is compliance with all other requirements.

Sec. 5. With the exception of shipping marks, any marks, brands, or labels, other than those prescribed by these regulations, shall be approved by the Secretary of Agriculture before they are used on packages of process or renovated butter.

Sec. 6. Approved copies of all marks, brands, or labels shall be retained at the manufacturers' registered place of business, available for inspection by an inspector.

Sec. 7. Every manufacturer of process or renovated butter who fails to brand the product and the containers in which it is packed is punishable by a fine of not less than $50 nor more than $500 or by imprisonment for not less than 1 month nor more than 6 months, or both. Every person who removes any such brands from any package of process or renovated butter is punishable by a fine not exceeding $1,000 or imprisonment not exceeding 1 year, or both, as provided in section 4, act of March 3, 1891, made applicable by section 5, act of May 9, 1902.

Sec. 8. Misbranding any article of food intended for interstate commerce, or manufactured or offered for sale in any Territory of the United States or the District of Columbia; is prohibited. That for the purposes of the Food and Drugs Act an article shall also be deemed to be misbranded in the case of food—

(1) If it be an imitation of, or offered for sale under the distinctive name of another article;

(2) If it be labeled or branded so as to deceive or mislead the purchaser, or purports to be a foreign product when not so, or if the contents of the package, as originally put up, shall have been removed in whole or in part and other contents shall have been placed in such package;

(3) If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count; or

(4) If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular.

No provision of these regulations shall be construed so as to relieve any person from compliance with the Federal Food and Drugs Act.

Sec. 9. Inspectors of the Department of Agriculture, appointed for the purpose by the Secretary of Agriculture, are authorized to enter all factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market for the pupose of examination or inspection authorized by this act.

Sec. 10. Periodic inspection of each factory shall be made by such inspectors who will submit a complete report to the Chief of Bureau on the sanitation of the premises, the character and condition of the materials used, and the quantity and quality of process or reno-

vated butter produced. The sanitary provisions of the Meat Inspection Act shall apply to the sanitary inspection of process or renovated butter factories. (See act of Aug. 10, 1912 (37 Stat., 273.)

Sec. 11. Process or renovated butter containing any filthy decomposed, or putried animal or vegetable substance shall be deemed adulterated under the Foods and Drugs Act.

Sec. 12. The Secretary of Agriculture will determine whether or not materials being used in the manufacture of process or renovated butter will be deleterious to health or unwholesome in the finished product. If any materials which have been so determined to be deleterious to health or unwholesome in the finished product are found to be present in any process or renovated butter, intended for, or in course of, exportation or shipment in interstate commerce, such process or renovated butter will be confiscated, as provided for in regulation 7, section 4 hereof.

Sec. 13. Original packages of process or renovated butter for export shall be stamped and branded as in the case of packages for domestic use and may be covered with cloth, jute, or burlap. The outer covering shall be conspicuously stenciled with the legend "Process Butter" or "Renovated Butter," in boldface gothic letters not less than an inch square, and the words "For Export Only" on the line beneath, in similar letters not less than three-eighths of an inch square.

Sec. 14. Process of renovated butter for export shall be examined by inspectors of the Department of Agriculture, who will issue a certificate as to its purity, quality, and grade and the sufficiency of the stamps and brands. If inspection is not made before the outer coverings are placed upon the packages, the exporter may be required to remove them.

(The foregoing secs. 1 to 14, have been promulgated by the Commissioner of Internal Revenue and approved

by the Secretary of the Treasury and the Secretary of Agriculture.)

Sec. 15. All marks, brands, or labels, within the meaning of these regulations shall include printed, lithographed, or embossed labels, stickers, seals, wrappers, and receptacles.

Sec. 16. Marks, brands, or labels to be affixed to process or renovated butter intended for export shall in all cases be printed in the English language, but they may also be literally translated into foreign languages.

Sec. 17. No mark, brand, stencil, sticker, label, or seal to be affixed to any tin, carton, wrapper, or other container in which process or renovated butter is placed shall be used until it is approved in its final form by the Chief of Bureau. Triplicates of new trade labels in the form of sketches, proofs, or photographic copies shall be transmitted direct or through inspectors to the Chief of Bureau for approval, and finished trade labels, cartons, or wrappers shall not be prepared in advance of such approval of sketches. After such labels, cartons, or wrappers have been printed, lithographed, or embossed in accordance with the approved sketches or proofs three each of such cartons, labels or wrappers shall be submitted direct or through the inspectors for final approval and filing. Copies of approved labels, cartons, or wrappers shall be kept on file and available for examination by inspectors upon request.

Sec. 18. Trade labels which bear any false or deceptive names shall not be used.

### *Regulation 6—Reports*

Section 1. Each process or renovated butter factory shall furnish to authorized inspectors accurate information as to all matters required in making their reports.

*Regulation 7.—Process or Renovated Butter Intended for or in the Course of Interstate Commerce or for Export*

Section 1. To determine whether or not materials used in the manufacture of process or renovated butter are deleterious to health or unwholesome in the finished product, a sample of such butter shall be taken.

Sec. 2. Such sample shall be drawn in the following manner: A sample will be taken from every package of each lot. However, (A) if a lot includes two or more packages from one *churning*, a sample may be taken from one package only; or (B) if the separate churnings are not indicated, not less than one sample from each 10 tubs may be taken. Additional samples may be taken if, in the opinion of the inspector, such action is necessary to obtain representative samples of such butter.

Sec. 3. The samples thus obtained, properly identified, shall be promptly forwarded to the Department for examination and chemical analysis.

Sec. 4. If such butter is found upon such examination and such chemical analysis to be deleterious to health or unwholesome, and such butter is intended for exportation or shipment into other States, or is in the course of exportation, or in the course of such shipment, the Secretary shall confiscate the same to prevent its use for food purposes. The Secretary may release such butter to its owner for industrial use, upon such conditions as he deems necessary to prevent its use for food purposes.

Sec. 5. Any butter suspected of being process or renovated, or adulterated, wherever found will be sampled as herein provided. The samples thus obtained, properly identified, shall be promptly forwarded to the Department for examination and chemical analysis, to-

gether with a statement outlining the circumstances of the collection of sample.

Sec. 6. All process or renovated butter intended for exportation or in the course of exportation must be marked as provided in these regulations.

Sec. 7. All process or renovated butter consigned to a foreign country must be inspected and duly certified before delivery to any vessel, carrier, or transportation company. Officers and agents of vessels and of transportation companies transporting merchandise consigned to foreign countries shall not accept process or renovated butter for transportation and export unless accompanied by an official inspection certificate issued pursuant to these regulations, properly dated and countersigned by an inspector. No vessel having on board any process or renovated butter for exportation from any port of the United States will be cleared until the owner or shipper shall obtain an inspection certificate as required by these regulations, attesting to the purity, legal composition, and suitability for export of such process or renovated butter.

Sec. 8. Owners or shippers of process or renovated butter intended for export shall apply for inspection in writing to the Chief of Bureau. The said application shall state the location or place of business of the owner or shipper and the usual place or places where the process or renovated butter may be inspected, the place or places from which it is directly transported to the exporting vessel or transportation company, and the probable frequency of exports.

Sec. 9. The Chief of Bureau shall, upon receipt of such application, designate an inspector for the service required.

Sec. 10. The owner or shipper will notify the inspector of every export shipment to be made by him, at least 12 hours in advance, and shall briefly describe the location, form of package, and quantity of process or ren-

ovated butter to be inspected. The inspector will not be required to make inspections at two or more places distantly removed from one another if the materials are to be included in one shipment, but the inspection of an entire shipment may be made at the pier or place of loading for export.

Sec. 11. Inspections of process or renovated butter for export may be made at the place of manufacture and such inspections may also be made at the place of exportation, if inspection has not previously been made, or, in the opinion of the inspector, a reinspection is necessary. The certificate for export will ordinarily be given by the inspector at the factory or at the place where the customs papers for export are prepared.

Sec. 12. The inspector will examine the merchandise specified with the least possible delay. And it will be the duty of inspectors to examine any process or renovated butter for export, upon the application, formal or informal, of transportation companies or their agents, or any such process or renovated butter about to be loaded for export, whether or not notice thereof has been received.

Sec. 13. Inspectors may make such examination of the process or renovated butter for export in such detail as in their judgment is deemed necessary to show that such butter complies with the law and the regulations. They may take samples of the same and detain the shipment, if deemed necessary, until chemical tests of samples are made. The presence, intact and properly affixed thereon, of the stamps, marks, and labels on a lot of process or renovated butter offered for export from a registered factory or factories may be accepted by an inspector as evidence of purity and of manufacture in accordance with law and these regulations, and the prescribed export certificate may then be executed by the inspector. Additional marks or labels may, however, be required by the inspector for the

more complete identification of the process or renovated butter to be exported.

Sec. 14. The inspector shall complete, countersign, and issue a certificate of export. Such certificate shall be dated, shall show the names of the exporter and consignee, and shall describe the lot of process or renovated butter to which it applies. Such description shall include the State, revenue district, and factory number of every factory represented in the lot, and the number of packages from each factory, their respective weights and the shipping marks. Such certificate shall state that the process or renovated butter in question is the product of a registered factory, of legal composition, and suitable for export. Certificates shall be numbered serially and rendered in triplicate.

Sec. 15. Only one certificate shall be issued for each consignment unless otherwise directed by the Chief of Bureau.

Sec. 16. The original certificate shall be delivered to the shipper and shall be used only for the purpose of effecting the transportation and delivery of the consignment.

Sec. 17. The duplicate of the certificate shall be delivered to the shipper and by him to the agent of the railroad or other carrier which transports the consignment from the United States otherwise than by water, or to the chief officer of the vessel on which the export shipment is made and without which no clearance shall be given to any vessel having aboard any process or renovated butter and shall be used only by these agencies and for the purpose of effecting the transportation of the consignment certified. The chief officer of the vessel shall file such duplicate with the customs officer at the time of filing the master's manifest or the supplemental manifest.

Sec. 18. The triplicate of the certificate shall be retained by the inspector issuing the same.

Sec. 19. Under no circumstances shall the original or the triplicate of any certificate be used for the purpose for which it is prescribed by paragraph 17 hereof that the duplicate shall be used.

Sec. 20. No person operating any steam or sailing vessel, and no railroad or other carrier, shall receive for transportation to any foreign country any process or renovated butter, except ship stores and small quantities exclusively for the personal use of the consignee and not for sale or distribution, unless and until a certificate of inspection covering the same has been issued and delivered as provided in these regulations.

Sec. 21. All special requirements, if any, of foreign countries in regard to export certificates for process or renovated butter shall be complied with in respect to all certificates issued, provided such requirements are not in violation of the laws of this country or the rules and regulations promulgated under such laws.

## SECTIONS OF ALABAMA AGRICULTURAL CODE OF 1927

37. POSSESSION: SALE AND DELIVERY OF PROHIBITED ARTICLES.—No person within this State shall manufacture for sale therein, have in possession with intent to sell, offer or expose for sale, sell, or deliver any article of food or drugs which is adulterated or misbranded within the meaning of this Article.

38. DEFINITION OF WORDS AND TERMS. —The word "article" when referring to food or drugs, is used in the broad and comprehensive sense and has reference to the food product or the drug product in question. The term "food" as used herein shall include all articles of food, drink, confectionery, or condiment, whether simple, mixed or compound, used or intended for use by man or domestic animals. The term "drug"

as used herein shall include all medicines and preparations recognized in the U. S. Pharmacopoeia or National Formulary for internal or external use and any substance of mixture of substances to be used for the cure, mitigation or preventation of disease in man or domestic animals. The words "standard of purity or quality" herein used shall refer to and include the standards of purity for food products promulgated by the State Board of Agriculture and statutes of this State.

39. ADULTERATION OF FOOD.—An article shall be deemed adulterated in the case of food: First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength. Second. If any substance has been substituted wholly or in part for the article. Third. If any valuable constituent of the article has been wholly or in part abstracted. Fourth. If it be mixed, colored, powdered, coated, stained, or otherwise treated in a manner whereby damage or inferiority is concealed, or in a manner whereby the appearance of said Article is improved; provided this shall not apply to the precoloring or processing of fruits where such precoloring or processing does not conceal damage or inferiority. Fifth. If it contains any poisonous or delterious ingredient which may render such article injurious to health; Provided, that when in the preparation of food products for shipment they are preserved by an external application applied in such a manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering of the package, the provisions of this Article shall be construed as applying only when said products are ready for consumption. Sixth. If it consists in whole or in part of a filthy. decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whe-

ther manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter. Seventh. If in the course of its preparation of manufacture an ingredient of inferior food value has been substituted in whole or in part for an ingredient of greater food value. Eighth. If it does not conform to the standard of purity or quality established for the article.

71. RENOVATED BUTTER.—No person shall sell in this State any butter that is produced by taking original packing stock butter, or other butter, or both, and melting the same so that the butter fat can be drawn off or extracted, then mixing the said butter fat with skimmed milk, or milk, or cream, or other milk product, and re-churning or re-working the said mixture, or that produced by any process that is commonly known as boiled, process or renovated butter, unless the words "renovated butter" shall be plainly branded with Gothic or bold faced letters at least three-fourths of an inch in height on the top and sides of each tub, or box, or pail, or other kind of case, or package, or on the wrapper of prints or rolls in which it is put up. If such butter is exposed for sale uncovered or not in a case or package, a placard containing the labels so printed shall be attached to the mass of butter in such manner as to easily be seen and read by the purchaser. The branding or marking of all packages shall be in the English language, and in a conspicuous place so as to be easily seen and read by the purchaser.

72. COMMISSIONER CHARGED WITH ENFORCEMENT.—The Commissioner and his duly authorized agents shall be charged with the proper enforcement of all the provisions of this Article.

Section 217. AS AMENDED. That Section 217 of Article Twenty-three of the 'Agricultural Code of

Alabama,' of 1927, be and the same is hereby amended so as to read as follows: Section 217. Suspension of Sale of Article.—If at any time the Commissioner or his duly authorized agent, shall have reason to believe that any product or products or article mentioned in the succeeding sections of this Article, which are held in possession, delivered, kept, offered or exposed for sale in this State, do not comply with the requirements of this Article or other Article of this Code as to ingredients, substance, analysis, marking or labelling, weight or measure of the same, it shall be his duty by written order to suspend the sale of the same until he shall have satisfied himself, or shall be satisfied by an analysis, or otherwise, that such product or article is made up, compounded or marked as required by law and rules and regulations under authority of law.' If he shall find that the same does not comply with such laws and rules and regulations, either before or after the making of such suspension order, then he is authorized to proceed with regard to the same as provided in the succeeding Sections of this Article, or he may order in writing the same to be held at his disposition pending the placing of such product or article in such condition as will meet the requirements of such laws, rules and regulation, under the supervision and direction of the Commissioner or his duly authorized agent, or at the discretion of the Commissioner proceeding with regards to the same as provided in the succeeding Sections of this Article. Provided in case the owner of such product or article denies by written notice to the Commissioner or his agent that the same is not in compliance with the laws, rules or regulations and requests a hearing thereon, the Commissioner or his agent shall as soon as practicable thereafter proceed as provided in the succeeding Sections of this Article, in order that the Court may hear and decide said issue and proceed as provided for in the succeeding Sections of this Article. Any person who

moves, transports, sells or in any other manner disposes of any product or article after such product has been ordered suspended or held as hereinbefore provided shall be guilty of a misdemeanor and upon conviction thereof fined not more than Five Hundred ($500.00) Dollars or imprisoned for not more than six months or both, provided that such product or article may be moved, transported or otherwise disposed of by and in compliance with written order by the Commissioner.

Sec. 3 pp. 1103 and 1104 of the Acts of 1935.

218. PROCEEDING TO CONDEMN SEIZED ARTICLE.—Any fertilizer, fertilizer material, ground limestone, paint, white lead, linseed oil, turpentine, kerosene or other illuminating oils, gasoline, benzine or other liquid motor fuels, insecticides and fungicides, commercial feeds, agricultural seeds, eggs, vinegar, sausage, milk, cream, ice cream or other dairy products, imitation butter and cheese, or any article of food or drug which is adulterated misbranded or under standard, grade, weight or measure claimed within the meaning of any provision of this Code, and which is manufactured for sale, held in possession with intent to sell, offered or exposed for sale, or sold or delivered within this State, shall be liable to be proceeded against in the Circuit Court of the County where the same is found and seized for confiscation by writ of attachment for condemnation. Such writ shall issue upon the sworn complaint of the Commissioner or his duly authorized agent, taken by an officer authorized to administer an oath to the effect that such articles or product is adulterated or misbranded or is under standard, grade, weight or measure claimed, as the case may be within the meaning of this Article. The said sworn comlpaint by said Commissioner or his duly authorized agent, may be amended at any stage of the proceedings. Said writ shall be returnable in five days to the Court issuing the

writ; such Court shall hear and decide whether the allegations of the complaint are true and whether said article or product shall be condemned and confiscated. Such hearing shall not be had until five days' notice of the date therefor shall have been served on the owner, his agent, or any other party having an interest in the same, except in case defined in subhead (a). Service of a copy of the writ of attachment showing the returns of the attaching officer shall be sufficient notice for the purposes of this Section. Such writ may be executed by the Commissioner, his duly authorized agent, or by any sheriff or constable in the State. Upon the seizure of the article or product described in the affidavit, it shall be the duty of the officer or person executing the writ to return same to the Circuit Court, with his return thereon, and within five days after its return, the Court shall make up an issue between the State as Plaintiff and the property seized as defendant. (a) In the event that the owner or his agent cannot be found in this State, then said service may be perfected by posting a copy of the writ in a conspicuous place upon the premises where the goods were found and seized, and by mailing a copy thereof by registered mail to the owner, or his agent, to his last known address, and this shall be deemed to be sufficient service of the notice required by this section. If upon the return day of such writ of attachment, the owner of the article or product, his agent or other party having an interest in same thus notified fails to appear and show cause why said goods should not be condemned, judgment of condemnation and confiscation shall, upon such default, be rendered by the Court on the basis of said complaint. If such owner or agent or other party having an interest in such article or product shall on or before the return day of the writ of attachment, or upon such other day as the Court upon application of such party may determine, shall file an answer upon oath denying the allegations of

adutleration, misbranding, or under standard, grade, weight or measure, as the case may be, in said complaint, the issue thus raised may be determined by the Court after hearing all the evidence offered by or in behalf of all the parties to the proceedings. Any such party may demand a jury trial of any issue of fact to be determined in the proceedings instituted hereunder, and in case a jury trial is demanded, the judgment rendered by the Court shall be in accordance with the facts as found by such jury; provided, however, that the verdict of the jury may be set aside by the Court where manifestly contrary to the evidence of law. If a judgment of condemnation and confiscation is rendered against such article or product as being adulterated, misbranded, or under standard, grade, weight or measure, within the meaning of this Article, the same shall be disposed of by destruction or sale, as the Court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Agricultural Fund, but such goods shall not be sold contrary to the provisions of this Article; provided, however, that upon the payment of the costs of such attachment proceedings and the execution and delivery of a good and sufficient bond to the effect that such article shall not be sold or otherwise disposed of contrary to the provisions of this Article, the Court may be ordered direct that such article or product shall be delivered to the owner thereof.

219. REPORT OF VIOLATIONS TO SOLICITOR. If it shall appear from examination or analysis of fertilizer, fertilizer material, ground limestone, paint, white lead, linseed oil, turpentine, kerosene or other illuminating oils, gasoline, benzine or other liquid motor fuels, insecticides and fungicides, commercial feeds, agricultural seed, eggs, vinegar, sausage, milk, cream, ice cream or other dairy products, imitation butter and cheese, or any articles of food or drugs that any

of the provisions of this Article have been violated, the Commissioner shall certify or cause to be certified the facts to the county or State solicitor, with a copy of the results of the analysis or examination, and said county or State solicitor upon receipt of this information shall cause appropriate proceedings to be instituted in the proper Court, for the imposition of fines and penalties herein provided.

FILE COPY

Office - Supreme Court, U.S.
DEC 8

IN THE

# *Supreme Court of the United States*

OCTOBER TERM, 1941

No. 28

CLOVERLEAF BUTTER COMPANY; a Corporation,
*Petitioner-Appellant,*

vs.

HAYGOOD PATTERSON, as Commissioner of Agriculture & Industries of the State of Alabama, et al.,
*Respondents.*

## PETITIONER'S REPLY BRIEF

HORACE C. WILKINSON,
ERLE PETTUS,
VICTOR H. SMITH,
Birmingham, Alabama,
*Counsel for*
*Petitioner-Appellant.*

# SUBJECT INDEX


| | Page |
|---|---|
| Departmental Opinion Discussed | 2, 11 |
| Authority to Seize Raw Material | 4 |
| Authority to Require Sanitary Plant | 9 |
| Legislative History | 11 |
| No Statutory Protection | 14 |
| The Crux of the Case | 16 |
| Authorities Cited by Respondent | 19 |


# CASES CITED


| | |
|---|---|
| Cary vs. South Dakota, 250 U. S. 118 | 21 |
| Clark Dist. Co. vs. Western Md. Ry., 242 U. S. 11 | 22 |
| Currin vs. Wallace, 306 U. S. 1 | 24 |
| Dahnke-Walker Mill. Co. vs. Bondurant, 257 U. S. 282 | 24 |
| Eicholz vs. Public Service Commission, 306 U. S. 268 | 20 |
| General Oil Co. vs. Crane, 209 U. S. 211 | 16 |
| Hartford Acc. & Indem. Co. vs. Ill., 298 U. S. 156 | 22 |
| Hipolite Egg Co. vs. U. S., 220 U. S. 45 | 18 |
| Hoke vs. U. S., 227 U. S. 308 | 18 |
| Labor Board vs. Jones & Laughlin, 301 U. S. 1 | 24 |
| Lottery Cases, 188 U. S. 321 | 18 |
| McCullock vs. Maryland, 4 Wheaton 316 | 18 |
| McCray vs. United States, 195 U. S. 27 | 19 |
| McDermott vs. Wisconsin, 228 U. S. 115 | 13-18 |
| Maurer vs. Hamilton, 309 U. S. 598 | 21 |
| Mo.-Pacific R. R. Co. vs. Porter, 273 U. S. 341 | 13 |
| Napier vs. Atlantic Coastline, 272 U. S. 605 | 13-18 |
| Plumlee vs. Mass., 155 U. S. 461 | 21 |
| Reagan vs. Farmers L. & T. Co., 154 U. S. 362 | 16 |
| Rhodes vs. Iowa, 170 U. S. 412 | 24 |
| Smyth vs. Ames, 169 U. S. 466 | 16 |
| State vs. Cecil, 216 Ala. 391 | 2 |
| U. S. vs. Greene, 137 Fed. 179 | 4, 6, 9 |
| U. S. vs. 1150 Lbs. Butter, 195 Fed. 657 | 22 |
| U. S. vs. 9 Barrels Butter, 241 Fed. 499 | 8 |
| H. P. Welch & Co. vs. New Hampshire, 306 U. S. 79 | 21 |
| Whipple vs. Martinson, 256 U. S. 41 | 21 |

## STATUTES CITED


| | Page |
|---|---|
| Ala. Code 1940, Title 2, Sec. 314 | 13, 14 |
| Ala. Gen. Acts, 1919, page 1031 | 14 |
| 32 Stat. 197 | 10 |
| 32 Stat. 196 | 10, 29 |
| 34 Stat. 676 | 11 |
| Internal Rev. Code, Sec. 2325 | 4 |
| U. S. Code Ann. | |
| Title 21, Sec. 72 | 4, 29, 35 |
| Sec. 73 | 30 |
| Sec. 74 | 9, 31 |
| Sec. 75 | 32 |
| Sec. 76 | 33 |
| Sec. 77 | 33 |
| Sec. 78 | 34 |
| Sec. 79 | 34 |
| Title 26, Sec. 995 | 4, 9, 29 |
| Sec. 997 | 1, 3, 9, 29 |
| Meat Inspection Laws—Pertinent Sections | 29 |
| Record, 62nd Cong. 2690-2691; 10478, 10500 | 11 |
| Reports Bureau Animal Industry | 5, 6, 38 |


IN THE

# *Supreme Court of the United States*

OCTOBER TERM, 1941

No. 28

CLOVERLEAF BUTTER COMPANY, a Corporation,
*Petitioner-Appellant,*

vs.

HAYGOOD PATTERSON, as Commissioner of Agriculture & Industries of the State of Alabama, et al.,
*Respondents.*

## PETITIONER'S REPLY BRIEF

*May It Please The Court:*

In our brief we inadvertently omitted printing that part of the Renovated Butter Act making the sanitary provisions of the Meat Inspection Law and the Slaughtering and Meat Canning Act applicable to renovated butter. U. S. C. A., Title 26, §997 (b) (c) (d). §2327 (b) (c) (d) I. R. C. These sections of the law are set out in the appendix to this brief.

Counsel for respondents concede (their brief page 32) that Congress has authorized and required the Secretary of Agriculture to cause a rigid sanitary inspection to be made of packing stock butter in interstate com-

merce, but they insist that Congress has not preempted the regulatory field, and they, therefore, claim, that the State is free to regulate packing stock butter in interstate commerce, although it is conceded that the inspection of such butter is committed to the Secretary of Agriculture of the United States.

Inspection is a form of regulation. Conceding the correctness of respondents' immediate contention the all sufficient answer is, the State of Alabama has never attempted by statute or otherwise to regulate packing stock butter in intersate commerce, and in seizing packing stock butter in interstate commerce respondents are acting entirely beyond any authority conferred on them by any statute of the State of Alabama. *State vs. Cecil*, 216 Ala. 391.

Some opinions of the solicitors of the department are cited to support the respondents' contention that the Secretary of Agriculture has no authority to seize or condemn any raw material unfit for renovation which he discovers by the inspection he is required to make. A statement of the proposition would seem to answer it. Absurd results are avoided when possible in construing a statute. A construction that renders a statute nugatory is not favored. We might say that if such construction is adopted, the exercise of the duty and power conferred upon the Secretary of Agriculture as to such raw materials is, for practical purposes, a waste of time and money.

The opinion rendered by the solicitor August 14, 1914, Appendix to respondents' brief, page 23, shows that the solicitor did not consider the effect and declared

purpose of the 1912 amendment making the sanitary provisons of the Slaughterhouse and Meat Canning Act applicable to process or renovated butter factories. *Title 26, Section 997, U. S. C. A., 34 Stat. 676.*

If the respondents acting under the statutes relied upon in this case may seize packing stock butter in actual transit from Georgia to Alabama and in the petitioner's plant awaiting processing for sale and delivery in interstate commerce, then there is nothing to prevent them from going into any one of the numerous packing houses in Alabama and seizing animals before they are inspected by Federal authorities or even slaughtered.

The respondents' contention in effect amounts to this: It says that Congress has said to the Secretary of Agriculture when it comes to raw material in interstate commerce intended for manufacture into renovated butter, "you may go out and swim but don't go near the water." "You must make a rigid sanitary inspection of the materials; it is your duty to look into it carefully; perform your duty; look all you like and then go on. You can't do anything about it." There is a presumption that Congress would not participate in a ridiculous performance.

It would be charitable but inaccurate to say that the only thing wrong with the opinions set out in respondents' supplemental brief and the appendix to the brief is that they are flatly in conflict with an act of Congress. They go further in erroneous premise and conclusion. They are irreconcilably opposed to the practice and procedure of the Department and a well reasoned case by a United States Court.

## AUTHORITY TO SEIZE RAW MATERIAL

Congress has decreed that the Secretary of Agriculture shall require raw material going into the manufacture of renovated butter to undergo a rigid sanitary inspection. Congress has also decreed that any raw material unfit to be renovated "shall be destroyed for food purposes in the presence of an inspector." *That mandate is incorporated into the renovated butter act by the provision making the provisions of the Meat Inspection Act applicable to the subjects described in Sec. 995, Title 26,* U. S. C. A. now Sec. 2325 I. R. C. One of the subjects described in said section is material going into the manufacture of renovated butter.

*U. S. v. Green,* 137 Fed. 179, is authority for the proposition that the only change necessary in order to adapt the Meat Inspection Act to the Renovated Butter Act is to eliminate the references therein to meat and packing esablishments and to substitute in lieu thereof materials going into the manufacture of renovated butter and renovated butter factories. If Sec. 72, Title 21, U. S. C. A. (Meat Inspection Law) is so treated, it destroys respondents' contention that the Secretary of Agriculture has no authority to seize and destroy raw material unfit for renovation. Said Section is set out in the appendix as adapted to the Renovated Butter Act.

The opinions are contrary to the practice and procedure in the Department. In the relevant part of the Twentieth Annual Report of the Chief of Bureau to the Secretary of Agrculture (set out in the appendix) it was said:

"Occasionally a lot of packing stock is found in such a condition of filth or putrefaction as to necessitate condemnation. In two instances material of this character has been manufactured before being seen, so the finished product had to be condemned as unfit for food. In such cases inspectors have required *that material* and product be disposed of as grease."

In the same report of the Bureau of Animal Industry, commencing on page 177 is an interesting chapter entitled: FACTS CONCERNING THE HISTORY, COMMERCE AND MANUFACTURE OF BUTTER, by Harry Hayword, M. S. Ass't Chief Dairy Division. Under the topic BUTTER SUBSTITUTES (page 193) it is said:

"At the present time there are three commercial substitutes for butter as it comes from the creamery or dairy churn. These are oleomargarine, butterine and renovated butter. These substitutes are manufactured and sold under the surveillance of the United States Government, and are subject to special taxes. * * * * *

"Renovated Butter is made 'from one or more lots of butter which have been subjected to any process by which it is melted, clarified, or refined' for the purpose of removing rancidity, or any deleterious flavors, *or of otherwise improving and rendering uniform miscellaneous lots of butter which could not find a profitable market without being subjected to some such process of renovation.* It is understood that renovated butter is pure butter, *but is made from stock that in itself is not fit for table use.* The purpose of Government surveil-

lance is to see that regulations are observed *whereby no unwholesome material* or process *is used* and so that the purchaser and consumer are advised as to the true character of this kind or grade of butter."

Twenty-First Annual Report of the Bureau of Animal Industry. This report was transmitted by D. E. Salmon, Chief of Bureau, to Hon. James Wilson, Secretary of Agriculture, under date of May 22, 1905.

Under the heading "Work in the Interest of Dairy" (Sub-topic "Inspection of Renovated Butter," among other things it is stated:

(p. 32) "The Treasury Department has reported 74 different factories having been licensed and bonded during the year for the manufacture of renovated butter, as against 82 for the year before. These were located in 14 States and the District of Columbia. Thirty-four of the factories have been in operation throughout the year; 9 commenced operations in July 1903, but ceased manufacturing before the close of the year, and 18 began operating subsequent to July and continued until the end of June, 1904. One factory which was licensed did not operate."

(p. 33) "The average quality of renovated butter is still improving. The difference in general character between the product of the past year and the same commodity a few years ago is very marked. * * * * *Occasionally a lot of packing stock is in such a condition of filth or putrefaction as to necessitate condemnation.* In still rarer cases the manufactured product is found so bad, because of bad materials, ignorance or negligence in renovat-

ing, or as the effect of age, as to make it unfit for food: *In a few such instances the sanitary inspection required by law and made by this Department has caused the objectionable materials to be removed from the food market and sold as grease.* But, as stated, such instances are very exceptional."

These reports show that the Secretary of Agriculture destroys raw material unfit for renovation wherever he discovered it.

The opinions relied on are in conflict with *U. S. v. Green,* supra. The Green case held that even the penal provisions of the Meat Inspection Act were transplanted to and incorporated in the Renovated Butter Act.

Mr. Kelly's letter on page 15 in the last Appendix to respondents' brief relates to a proposed amendment to the Renovated Butter Act and not to the Act of 1902 as amended in 1912. The renovated butter industry regards that letter as entirely irrelevant to this case. The industry has at all times taken the position, so far as we are advised, that the Secretary of Agriculture of the United States has ample authority to inspect the raw material and to cause any raw material unfit for renovation to be destroyed. The petitioner has no objection to the Secretary of Agriculture exercising that authority. No additional legislation on the subject is necessary.

Mr. Kelly's statement that "it is axiomatic that despite the process through which butter or butter oil pass during the course of manufacturing renovated butter, certain soluble materials unfit for human consumption cannot be removed and it is difficult if not impossible to detect them in the finished product" will be denied

and challenged by every scientist of experience with modern methods of renovating butter. Likewise his statement that "a lot of butter may be infested with maggots and should be condemned for use in the manufacture of renovated butter" may be true where the infestation is so extensive as to render the raw material unfit for renovation, but the presence of one maggot in a barrel of butter furnishes no basis for condemning the barrel of butter as the most renowned experts in the country have abundantly demonstrated and the U. S. District Court has ruled.

*U. S. v. 9 Barrels of Butter*, 241 Fed. 499.

Mr. Kelly's conclusion that the animal fat from these maggots will be mixed with the butter fat in a way that renders their removal impossible is at war with science itself. It ignores the effect of centrifugation, pasteurization, sterilization, evaporation, and the exposure of animal fat to high temperature for a long time.

*Germany is now manufacturing good butter from coal according to recent authoritative scientific pronouncements in this country.* Doubtless Mr. Kelly would frown on an operation of that kind but we may come to that before the war is over.

An opinion in conflict with an act of Congress, a Court decision, and at war with science itself, is of doubtful value. Manifestly such opinions cannot override an act of Congress.

One basic trouble with the departmental opinions cited by respondents is that they read the Renovated

Butter Act as if the sanitary provisions of the Meat Inspection Act were not incorporated in the butter law. Congress framed our Federal Law to the contrary.

## AUTHORITY TO REQUIRE A SANITARY PLANT

The opinion of assistant Department Solicitor Boyle is cited to sustain the proposition that the Secretary of Agriculture has no way under existing law to compel an operator to improve the sanitary condition of his factory.

If that be true, why the elaborate regulations about the sanitary conditions of the plant in Regulation No. 9, which requires the air to be filtered, the clothing to be spotless, the employees to be healthy, the sanitary fixtures to be located at a specified place, screens and precautions against dust and dirt and foreign matter? Has the Secretary of Agriculture done a vain and useless thing?

The assistant solicitor evidently overlooked Subsection (c) in Sec. 997 making the SLAUGHTER AND MEAT CANNING ACT applicable to RENOVATED BUTTER FACTORIES, whereas the meat inspection act is applicable to the subjects in Sec. 995.

What is the effect of making the Slaughter and Meat Canning Act applicable to renovated butter *factories?* Following the rule in the Green case, and substituting renovated butter factories for slaughter houses, we would have Sec. 74 of the Meat Inspection Act modi-

fied to make it applicable to renovated butter, incorporated in the Renovated Butter Law reading thusly:

> "The Secretary of Agriculture shall cause to be made by experts in sanitation, or by other competent inspectors, such inspection of all renovated butter factories or similar establishments in which renovated butter is prepared for interstate or foreign commerce, as may be necessary to inform himself concerning the sanitary conditions of the same and to prescribe the rules and regulations of sanitation under which such establishments shall be maintained; and where the sanitary conditions of any such establishment are such that renovated butter is rendered unclean, unsound, unhealthful, unwholesome, or otherwise unfit for human food, he shall refuse to allow said renovated butter to be labeled."

What effect does that have? Just this and no more. *The shipment of unlabeled renovated butter is punishable by fine and imprisonment. 32 Stat. 197.*

In this connection it is well to refer to the fact that the duty of the Secretary of Agriculture is not merely to inspect. It is, also, to prescribe the rules and regulations for carrying the provisions of the Meat Inspection Act and the Slaughter and Meat Canning Act—incorporated by express provision in the renovated butter law—providing for the destruction of material deleterious to health or unwholesome in the finished product and for the highest sanitary standard in the factory itself into effect. Congress set the standard for the material. That action precluded the respondents from attempting to impose or enforce any other standard.

The question of the sanitary condition of the plant is not raised in this case. The solicitor's opinion recognizes that the department can condemn unwholesome finished products intended for sale in interstate commerce.

## LEGISLATIVE HISTORY

When the amendment to the Renovated Butter Act was before the House Committee on Agriculture in 1912 (House Bill 18960) it was insisted by representatives of the Secretary of Agriculture that the extension of the Meat Inspection Law, which itself had been previously strengthened, (34 Stat. p. 676) to the Renovated Butter Act, would confer all needed and desired authority on the Secretary of Agriculture to seize and condemn raw material unfit for renovation and unwholesome finished product. *Congressional Record; 62nd Congress, pages 2690-2691.* It was urged that it was so important to extend the recently strengthened meat inspection laws to the Renovated Butter Act that it should be done regardless of the fact that the amendment was subject to a point of order. (Congressional Record, 62nd Congress, pp. 2690-2691). The House sustained the point of order; the Senate restored the provisions and extended the provisions of the meat inspection law to the Renovated Butter Act and the House concurred in the amendment. Congressional Record, 62nd Congress, pp. 10478, 10500.

This legislative history disposes of the contention that the Secretary of Agriculture is without authority to

seize raw material unfit for renovation and demonstrates the error underlying this contention in the respondents' brief.

If, however, it should be held that we are mistaken as to the force and effect of the legislative history of the 1912 amendment and the meaning and import of the words employed in Section 5 of the Act of 1902 as well as the amendment of 1912, then we respectfully submit that it conclusively appears that Congress regulated renovated butter in interstate commerce. It also recognized packing stock butter as a legitimate article of commerce, and it would seem to follow under such circumstances that Congress intended to make the wholesomeness of the finished product and its suitability as food the test of its right to enter the channels of interstate commerce. Congress unquestionably had the right to regulate packing stock butter and renovated butter in interstate commerce. If it regulated the finished product by making its wholesomeness and suitability as food the test and recognized the raw material as a legitimate article of commerce, it necessarily follows that it was the intention and purpose of Congress that packing stock butter should be first processed and its wholesomeness and suitability made the test of its right to enter the channels of interstate commerce, after renovation was completed.

There would be nothing unreasonable in a Congressional regulation of that kind. The public is abundantly protected as long as the finished product containing anything unwholesome or deleterious to health is excluded from interstate commerce. If Congress adopted

that method of protecting the public the State has no authority to supplement the efforts of Congress or to enforce other methods so far as interstate commerce is concerned.

The State cannot question the efficacy or sufficiency of Congressional regulations. Congress having entered into the regulation of the finished product must be deemed to have determined that the method provided was sufficient and that no other method is necessary.

*Missouri Pacific RR Co. v. Porter*, 273 U. S. 341.
*McDermott v. Wisconsin*, 228 U. S. 115.
*Napier v. Atlantic Coast Line*, 272 U. S. 605.

The sum and substance of the respondents' contention is that the Federal law as it now stands means that packing stock butter may be first processed before it is liable to seizure and if seized at all it must be seized after conversion into the finished product.

Conceding that to be true we insist it is not within the province of these state officers to say, in effect: "We don't care if Congress has declared that it may be processed before it is subject to seizure; it makes no difference if it is in interstate commerce; we will not permit you to process it. We are going to seize and condemn it, congressional provision to the contrary notwithstanding."

## NO STATUTORY PROTECTION

On page 48 of their brief in Note 27, respondents call attention to Title 2, Section 314 of the Alabama Agri-

cultural Code of 1940 which, in effect, declares that the possession of adulterated or misbranded food is prima facie evidence of having it in possession with intent to sell such food in violaton of the Alabama laws, *except a manufacturer, wholesaler or purchaser may keep properly identified goods specially set apart for sale in other states which might otherwise be in violation of the provisions of the article,* and it is intimated that the exception in the Alabama Code of 1940, which became effective after this case was tried by the Circuit Court of Appeals and after the certiorari in this case was granted, will afford full protection to petitioner's raw material in interstate commerce.

Title 2, Section 314 of the Alabama Code of 1940 was taken from the Alabama Food and Drug Act of 1919. Alabama General Acts 1919, p. 1031. The provisions in this section were not incorporated in the Alabama Agricultural Code of 1927 and were not in force and effect prior to the issuance of the writ of certiorari in this case. For that reason we say said statute has no place in this case. However, the contention that it will afford full protection to petitioner's raw material in interstate commerce is inconsistent with the tenor of the rest of the argument made in brief of respondents. They are vigorously insisting that they have the right to seize the raw material in interstate commerce because they say Congress has not entered the field of regulation of raw material in interstate commerce.

*Section 314, Title 2 of the Alabama Code of 1940 demonstrates that when the Legislature of Alabama adopted a new code it consistently followed its previous*

*policy by incorporating a provision therein evidencing its intent not to extend the operation of Alabama laws into the field of interstate commerce.*

If the respondents can stop a truck loaded with packing stock butter moving in interstate commerce and seize the raw material then in transit (which the bill shows occurred a few days before the suit was filed R. p. 11) or if they may seize such packing stock butter in the plant immediately upon its arrival, before reasonable opportunity is afforded to specially set it apart and properly identify it, the provision that the Alabama Legislature incorporated in the Alabama Code evidencing its intention not to extend the operation of Alabama laws into the field of interstate commerce, affords the petitioner no protection.

The trouble in this case is not with the law of Alabama. The Alabama Legislature has made it plain that it has no intention of extending the operation of the Alabama statutes into the field of interstate commerce. The trouble is with the respondents. They have attempted to place their own construction on the Alabama statute, a construction that is not supported by the language employed by the Legislature or the interpretation accorded the language by the highest court in Alabama. Unless restrained respondents will continue the same course and continue to place an unwarranted construction on the Alabama statute, and continue to usurp the function and authority delegated by the Federal statute to the United States Secretary of

Agriculture. In such a situation the petitioner is entitled to relief.

*General Oil Co. vs. Crane*, 209 U. S. 211.
*Smyth v. Ames*, 169 U. S. 466.
*Ragan v. Farmers Loan & Trust Co.*, 154 U. S. 362.

## THE CRUX OF THE CASE

Respondents claim the authority to stop a truck, loaded with packing stock butter, moving in interstate commerce, from Georgia to Alabama, en route to petitioner's plant, and before interstate movement is completed by delivery of the product, to seize it and destroy it, *if they claim it is not fit for table use*. Neither State nor Federal law confers any such authority on them.

If this is the law, then it is the end of the Renovated Butter Business. Everybody, everywhere, under all circumstances, has always recognized that most renovated butter is made from stock not fit for table use in its then condition. Standard butter needs no renovation.

To deny petitioner's right to engage in the business of bringing sub-standard butter up to standard, is to deny it the right to engage in a gainful, lawful, useful, harmless, occupation. To deny it the right to transport sub-standard butter in interstate commerce intended solely for renovation, is in effect denying it the right to engage in the business of bringing sub-standard butter up to standard.

If respondents prevail, petitioner must cease renovat-

ing butter in Alabama. That State is the only State in which State officers claim the authority to stop interstate trucks loaded with packing stock butter for the purpose of seizing it if they claim it is not fit for table use. The irony of it is, that the packing stock butter now being brought to Birmingham for renovation, from states outside Alabama, can now be renovated in Atlanta by petitioner's competitor, and shipped into Alabama as a finished product free from deleterious or unwholesome material. And the Alabama farmer will find himself without a profitable market for his country butter. All because over-zealous officials seek to exercise more authority than the law has conferred on them.

Assuming merit in the contention that Congress did not authorize the seizure of raw material unfit for renovation the fact remains that the material and finished product have been regulated by Congress. With all of the facts before it and an intimate acquaintance with the character of raw material going into the manufacture of renovated butter, Congress recognized such material as a legitimate article of commerce. The State of Alabama does the same thing. If Congress was of the opinion that the regulation it prescribed was sufficient, that is to say if Congress was of the opinion that regulations short of seizure of such material were sufficient, the resopndents are still precluded from supplementing Congressional action.

> "That Congress has ample power in this connection is no longer open to question. That body has the right not only to pass law which shall regulate

legitimate commerce among the States and with foreign nations, but has full power to keep the channels of such commerce free from the transportation of illicit or harmful articles, to make such as are injurious to the public health outlaws of such commerce and to bar them from the facilities and privileges thereof. Congress may itself determine the means appropriate to this purpose, and so long as they do no violence to other provisions of the Constitution it is itself the judge of the means to be employed in exercising the powers conferred upon it in this respect. *McCulloch v. Maryland*, 4 Wheat. 316,421; *Lottery Case*, 188 U. S. 321, 355; *Hipolite Egg Co. v. United States*, 220 U. S. 45; *Hoke v. United States*, 227 U. S. 308.

"The Food and Drugs Act was passed by Congress under its authority to exclude from interstate commerce impure and adulterated food and drugs and to prevent the facilities of such commerce being used to enable such articles to be transported throughout the country from their place of manufacture to the people who consume and use them, and it is in the light of the purpose and of the power exerted in its passage by Congress that this act must be considered and construed. Hipolite Egg Co. v. United States, supra."

*McDermott v. Wisconsin*, 228 U. S. 115.

See also:

*Napier v. A. C. L.*, 272 U. S. 606.

The renovated butter act was passed by Congress under its authority "to exclude from interstate commerce impure and adulterated food and to prevent the facilities of such commerce being used to enable such articles

to be transported throughout the country from their place of manufacture to the people who consume and use them, and it is in the light of the purpose and of the power exerted in its passage by Congress that this act must be considered and construed."

## AUTHORITIES CITED BY RESPONDENTS

### *McCray vs. U. S.*, 195 U. S. 27.

On pages 13-14 of their brief, respondents seem to contend that the decision rendered by this Court in the case of McCray vs. U. S., 195 U. S. 27 construed section 5 of the Renovated Butter Act of 1902, and that by such construction it was held to be a revenue measure. Any such contention is erroneous.

The McCray case involved only one question, viz: the constitutionality of section 2 of the Act of 1902 fixing a tax of ten cents per pound on *oleomargarine* with the provision that when such product was free from artificial coloration that causes it to look like butter of any shade of yellow, the tax should be one-fourth of one cent per pound.

The sections of the Act relating to process or renovated butter were in no manner involved and no construction of them was undertaken.

The appellant urged many reasons why the ten cents per pound tax was unconstitutional. The Court, speaking through Mr. Justice White disposed of these arguments and upheld the tax on oleomargarine.

The full title of the Act of 1902 is set out in the opin-

ion, and after quoting the pertinent section, Mr. Justice White said:

> "The section in question, as well as those following it, contains many administrative provisions for the enforcement of the taxes levied by the act, *and concerning interstate and foreign commerce in the articles referred to.*"

In the further course of the opinion, Mr. Justice White made the following statement which is here applicable.

> "Of course, where a State law is assailed as repugnant to the Constittuion of the United States, and on its face, such act was seemingly within the power of the State to adopt, but its necessary effect and operation is to usurp a power granted by the Constitution to the government of the United States, it must follow from the paramount nature of the Constitution of the United States the act is void."

The gist of the opinion was that the act was not an unconstitutional exercise of power by Congress: That as Congress had the power to levy such tax, the judicial department had no authority to inquire into the motives which entered into its passage or its effect on the oleomargarine business.

> *Eichholz vs. Public Service Commission*, 306 U. S. 268.

In this case the Court ruled that the State act under consideration had not been superseded by the Federal

Motor Carrier Act. The carrier's permit was revoked because the carrier evaded the state law. The interstate commerce in theory was intra-state commerce in fact.

*Plumlee v. Mass.*, 155 U. S. 461.

This case involved *a local sale* and violation of *local law* on colored oleomargarine. The statute did not prohibit the sale of oleomargarine. It was held that the state had not surrendered its power to prevent fraud in the local sale of property.

*Cary v. South Dakota*, 250 U. S. 118.

It was held in this case that the state law prohibiting shipment of wild ducks was not superseded by the Federal Migratory Bird Law which only prohibited killing of birds during closed season but did not prohibit their shipment at any time.

*H. P. Welch & Co. v. New Hampshire*, 306 U. S. 79.

The Court held that the 12 hour law for truck drivers was not superseded by Federal legislation *at the time the act complained of occurred*, but the Court pointed out in its opinion that it assumed that subsequent Federal legislation would supersede the state law when the Federal law became effective. (p. 84).

*Maurer v. Hamilton*, 309 U. S. 598.

It was held that a State law prohibiting any vehicle from carrying another vehicle above the head of the driver related to "sizes and weights" and was not superseded by the Federal Motor Carrier Act which did not cover the field of sizes and weights, *which field was left to the State by Section 225 of the Federal Motor Carrier Act.*

*Whipple v. Martinson*, 256, U. S. 41.

It was held that a State statute prohibiting a physician from furnishing narcotics to habitual users *out of stock kept on hand by the physician* was not superseded by the Harrison Narcotic Act which did not deal with a physician furnishing narcotics to habitual users out of stock on hand. *No element of interstate commerce was involved.*

*Hartford Accident & Indemnity Co. v. Illinois*, 298 U. S. 156.

It was ruled that the statute regulating commission merchants affected interstate commerce *only indirectly*. The State act required a bond. The Federal act did not require a bond, but *provided in express language that State acts were to remain in effect unless inconsistent with the Federal acts.*

*Clark Distilling Co. v. Western Maryland Ry.*, 242 U. S. 311.

It was decided that Congress may prohibit the transportation of liquor in interstate commerce under its

power to regulate interstate commerce, and having the power to prohibit the transportation of liquor Congress may subject it to State laws prohibiting its movement within a State.

*United States vs. 1150 Lbs. Butter*, 195 Fed. 657.

It was held that the burden was on the Government to show some process or material used in manufacturing with the intent of introducing an abnormal quantity of moisture in the butter; that the Secretary of Agriculture could not make the mere presence of an abnormal (16%) quantity of moisture in butter a violation of a statute that required an act to be done with a specified intent.

When the statutes involved are considered and decisions cited by respondents are analyzed it will appear that there is no conflict between the cases relied on by the respondents and the so-called "railroad cases."

## SECTION 1 OF THE RENOVATED BUTTER ACT DOES NOT SUBJECT PACKING STOCK BUTTER TO STATE LAW

Counsel for the respondents take the position, page 22 of their brief, that Section 1 of the Renovated Butter Act making renovated butter transported into a State and remaining therein for *use, consumption, sale or storage* therein subject to the laws of the State to the same extent and in the same manner as though such butter had been produced in such State, is an indication

of the will of Congress that the State might inerfere with packing stock butter in interstate commerce.

It is respectfully submitted that the statute is not subject to any such interpretation.

In the first place, the aforesaid provision in Section 1 was taken bodily from the Wilson bill construed in *Rhodes v. Iowa*, 170 U. S. 412 wherein this Court held that a statute subjecting imports to State police power is operative only after the contract of shipment is consummated by delivery and does not authorize an interference with the articles subject to State police power until its interstate character is terminated.

Under recent decisions of this Court enlarging upon the interstate commerce clause in the Constitution of the United States it logically follows that packing stock butter in interstate commerce cannot be interfered with by State authorities until it is renovated into finished product, and kept or offered for sale in Alabama.

*Labor Board v. Jones & Laughlin*, 301 U. S. 1.
*Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282.
*Currin v. Wallace*, 306 U. S. 1.

In the next place Section 1 is applicable to the finished product and not to raw material and does not apply to the finshed product unless the finished product remains in the State for use, consumption, sale or storage therein. The plain purpose and object of this provision in Section 1 was to get around the "original package" doctrine.

The argument that the aforesaid construction of Sec-

tion 1 would enable a manufacturer in a particular state to import packing stock butter unfit for renovation and use it in the manufacture of renovated butter free from State inspection or Federal seizure, ignores the mandatory provisions in the Renovated Butter Act requiring the Secretary of Agriculture to make a rigid sanitary inspection of the raw materials going into the manufacture of renovated butter and the applicable provisions of the Meat Inspection Law requiring the destruction of raw material unfit for renovation in the presence of an agent of the Secretary of Agriculture.

If the respondents are correct and we are mistaken about the meaning and effect of the language in Section 1 we still remind the Court that the Alabama statutes do not purport to extend to the field of interstate commerce and do not authorize any interference with packing stock butter in interstate commerce.

## CONCLUSION

1. By a stipulation in writing incorporated in the record the parties agree that this case involves questions of law only. (R. p. 36) It appears without challenge or dispute that the packing stock butter seized by the respondents was in interstate commerce at the time it was seized.

2. No statute of the State of Alabama extends to interstate commerce.

3. Congress has required the Secretary of Agriculture of the United States to make a rigid sanitary inspection of the packing stock butter going into the man-

ufacture of renovated butter. By statute Congress requires the destruction of packing stock butter found by the Secretary of Agriculture on inspection to be unfit for renovation. We, therefore, respectfully submit that Congress has completely and exclusively occupied the field.

But even if it has not, no statute of the State of Alabama authorizes the respondents to invade it as they have done and threaten to continue. The action of the respondents is contrary to and in defiance of the authority conferred upon the Secretary of Agriculture of the United States and without support in the statutes of the State of Alabama.

For these reasons the decision of the Circuit Court of Appeals for the Fifth Circuit should be reversed and the cause remanded.

Respectfully submitted.

HORACE C. WILKINSON,
EARLE PETTUS,
VICTOR H. SMITH,
*Attorneys for Petitioner-Appellant.*

# APPENDIX

---

## FEDERAL STATUTES APPLICABLE TO RENOVATED BUTTER

## PERTINENT PROVISIONS OF THE MEAT INSPECTION LAW

## SEC. 72 U. S. C. A., TITLE 21, ADAPTED TO RENOVATED BUTTER

## RELEVANT PARTS OF REPORT OF THE BUREAU OF ANIMAL INDUSTRY

## FEDERAL STATUTES APPLICABLE TO RENOVATED BUTTER

Title 26, U. S. C. A. Sec. 997 (b), (c) and (d), Sec. 2327 (b), (c) and (d), I. R. C.

"(b) *Inspection of live cattle and meat.* All parts of sections 71 to 93 of Title 21, which are applicable to the subjects and purposes described in section 995 shall apply *to process or renovated butter.* (May 9, 1902, c. 784, Sec. 5, 32 Stat. 196.)

"(c) *Slaughtering and meat canning.* The sanitary provisions for slaughtering, meat canning, or similar establishments as set forth in sections 71 to 93 of Title 21, shall be extended to cover *renovated butter factories* as defined in this subchapter, under such regulations as the Secretary of Agriculture may prescribe. (Aug. 10, 1912, c. 284, 37 Stat. 273.)

"(d) *Tobacco and snuff.* The provisions of law governing the engraving, issuing, sale, accountability, defacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, shall apply to the stamps provided in section 991 (c) (1). (May 9, 1902, C. 784, Sec. 4, 32 Stat. 194.)

## PERTINENT SECTIONS MEAT INSPECTION LAWS

United States Code Annotated, Title 21, Sections 72-79.

72. Post-mortem examination of carcasses and marking or labeling; destruction of carcasses condemned; reinspection. For the purpose hereinbefore set forth the Secretary of Agriculture shall cause to be made by in-

spectors appointed for that purpose a post mortem examination and inspection of the carcasses and parts thereof of all cattle, sheep, swine, and goats to be prepared for human consumption at any slaughtering, meat canning, salting, packing rendering, or similar establishment in any State, Territory, or the District of Columbia for transportation or sale as articles of interstate or foreign commerce; and the carcasses and parts thereof of all such animals found to be sound, healthful, wholesome, and fit for human food shall be marked, stamped, tagged, or labeled as "Inspected and passed"; and said inspectors shall label, mark, stamp or tag as "Inspected and condemned" all carcasses and parts thereof of animals found to be unsound, unhealthful, unwholesome, or otherwise unfit for human food; and all carcasses and parts thereof thus inspected and condemned shall be destroyed for food purposes by the said establishment in the presence of an inspector, and the Secretary of Agriculture may remove inspectors from any such establishment which fails to so destroy any such condemned carcass or part thereof, and said inspectors, after said first inspection, shall, when they deem it necessary, reinspect said carcasses or parts thereof to determine whether since the first inspection the same have become unsound, unhealthful, unwholesome, or in any way unfit for human food, and if any carcass or any part thereof shall, upon examination and inspection subsequent to the first examination and inspection, be found to be unsound, unhealthful, unwholesome, or otherwise unfit for human food, it shall be destroyed for food purposes by the said establishment in the presence of an inspector, and the Secretary of Agriculture may remove inspectors from any establishment which fails to so destroy any such condemned carcass or part thereof.

73. Examination of carcasses brought nto slaughtering or packing establishments, and of meat food prod-

ucts issued from and returned thereto. The foregoing provisions shall apply to all carcasses or parts of carcasses of cattle, sheep, swine, and goats, or the meat or meat products thereof which may be brought into any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, and such examination and inspection shall be had before the said carcasses or parts thereof shall be allowed to enter into any department wherein the same are to be treated and prepared for meat food products; and the foregoing provisions shall also apply to all such products, which, after having been issued from any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, shall be returned to the same or to any similar establishment where such inspection is maintained.

74. Inspectors of meat food products; marks of inspection; destruction of condemned products; products for export. For the purpose hereinbefore set forth the Secretary of Agriculture shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of all meat food products prepared for interstate or foreign commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, and for the purposes of any examination and inspection said inspectors shall have access at all times, by day or night, whether the establishment be operated or not, to every part of said establishment; and said inspectors shall mark, stamp, tag, or label as "Inspected and passed" all such products found to be sound, healthful, and wholesome, and which contain no dyes, chemicals, preservatives, or ingredients which render such meat, or meat food products unsound, unhealthful, unwholesome, or unfit for human food; and said inspectors shall label, mark, stamp, or tag as "Inspected and condemned" all such products found unsound, unhealthful, and unwholesome, or which contain dyes, chemicals, preservatives, or ingredients which render such meat or

meat food products unsound, unhealthful, unwholesome, or unfit for human food, and all such condemned meat food products shall be destroyed for food purposes, as hereinbefore provided, and the Secretary of Agriculture may remove inspectors from any establishment which fails to so destroy such condemned meat food products: Provided, That subject to the rules and regulations of the Secretary of Agriculture the provisions of this section in regard to preservatives shall not apply to meat food products for export to any foreign country and which are prepared or packed according to the specifications or direction of the foreign purchaser, when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is to be exported; but if said article shall be in fact sold or offered for sale for domestic use or consumption then this proviso shall not exempt said article from the operation of all the other provisions of sections 71 to 94 inclusive, of this title.

75. Labeling receptacles or coverings of meat or meat food products inspected and passed; supervision by inspectors; sales under false names; trade names. When any meat or meat food product prepared for interstate or foreign commerce which has been inspected as hereinbefore provided and marked "Inspected and passed" shall be placed or packed in any can, pot, tin, canvas, or other receptacle or covering in any establishment where inspection under the provsions of sections 71 to 94, inclusive, of this title is maintained, the person, firm, or corporation preparing said product shall cause a label to be attached to said can, pot, tin, canvas, or other receptacle or covering, under the supervision of an inspector, which label shall state that the contents thereof have been "inspected and passed" under the provisions of such sections; and no inspection and examination of meat or meat food products deposited or inclosed in cans, tins, pots, canvas, or other receptacle or

covering in any establishment where inspection under the provisions of such sections is maintained shall be deemed to be complete until such meat or meat food products have been sealed or inclosed in said can, tin, pot, canvas, or other receptacle or covering under the supervision of an inspector, and no such meat or meat food products shall be sold or offered for sale by any person, firm or corporation in interstate or foreign commerce under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted.

76. Sanitary inspection and regulation of slaughtering and packing establishments; rejection of meat or meat food products unfit for food. The Secretary of Agriculture shall cause to be made, by experts in sanitation or by other competent inspectors, such inspection of all slaughtering, meat canning, salting, packing, rendering, or similar establishments in which cattle, sheep, swine, and goats are slaughtered and the meat and meat food products thereof are prepared for interstate or foreign commerce as may be necessary to inform himself concerning the sanitary conditions of the same, and to prescribe the rules and regulations of sanitation under which such establishments shall be maintained; and where the sanitary conditions of any such establishment are such that the meat or meat food products are rendered unclean, unsound, unhealthful, unwholesome, or otherwise unfit for human food, he shall refuse to allow said meat or meat food products to be labeled, marked, stamped, or tagged as "inspected and passed".

77. Examination of cattle and food products thereof, slaughtered and prepared during nighttime. The Secretary of Agriculture shall cause an examination and inspection of all cattle, sheep, swine, and goats, and the food products thereof, slaughtered and prepared in the

establishments hereinbefore described for the purposes of interstate or foreign commerce to be made during the nighttime as well as during the daytime when the slaughtering of said cattle, sheep, swine, and goats, or the preparation of said food products is conducted during the nighttime.

78. Transportation of carcasses, meat, or meat food products not properly inspected and marked. No person, firm, or corporation shall transport or offer for transportation, and no carrier of interstate or foreign commerce shall transport or receive for transportation from one State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to any place under the jurisdiction of the United States, or to any foreign country, any carcasses or parts thereof, meat, or meat food products thereof which have not been inspected, examined, and marked as "Inspected and passed," in accordance with the terms of sections 71 to 94, inclusive, of this title, and with the rules and regulations prescribed by the Secretary of Agriculture.

79. Forgery, alteration or unauthorized use of marks, labels, or other identification devices or certificates. No person, firm, or corporation, or officer, agent, or employee thereof, shall forge, counterfeit, simulate, or falsely represent, or shall without proper authority use, fail to use, or detach, or shall knowingly or wrongfully alter, deface, or destroy, or fail to deface or destroy, any of the marks, stamps, tags, labels, or other identification devices provided for in section 71 to 94, inclusive, of this title, or in and as directed by the rules and regulations prescribed hereunder by the Secretary of Agriculture on any carcasses, parts of carcasses, or the food product, or containers thereof, subject to the provisions of such sections or any certificate in relation thereto, authorized or required by such sections or by the said rules and regulations of the Secretary of Agriculture.

# SEC. 72, TITLE 21, U. S. C. A. ADAPTED TO RENOVATED BUTTER

## § 72 *Meat Inspection Law*

72. Post mortem examination of carcasses and marking or labeling; destruction of carcasses condemned; reinspection. For the purpose hereinbefore set forth the Secretary of Agriculture shall cause to be made by inspectors appointed for that purpose a post mortem examination and inspection of the carcasses and parts thereof of all cattle, sheep, swine, and goats to be prepared for human consumption at any slaughtering, meat canning, salting, packing, rendering, or similar establishment in any State, Territory, or the District of Columbia for transportation or sale as articles of interstate or foreign commerce; and the carcasses and parts thereof of all such animals found to be sound, healthful, wholesome, and fit for human food shall be marked, stamped,

*(Continued on next page)*

## § 72 *Adapted to Renovated Butter*

"72. Examination of material and marking or labeling; destruction of material condemned; reinspection. For the purpose hereinbefore set forth the Secretary of Agriculture shall cause to be made by inspectors appointed for that purpose an examination and inspection of all raw material going into the manufacture of renovated butter to be prepared for human consumption at any renovating butter factory, or similar establishment in any State, Territory, or the District of Columbia for transportation or sale as articles of interstate or foreign commerce; and the material and parts thereof of all such material found to be sound, marked, stamped, tagged, or labeled as 'Inspected and passed'; and said inspectors shall label, mark, stamp or tag as 'Inspected

*(Continued on next page)*

tagged, or labeled as "Inspected and passed"; and said inspectors shall, label, mark, stamp or tag as "Inspected and condemned" all carcasses and parts thereof of animals found to be unsound, unhealthful unwholesome, or otherwise unfit for human food; and all carcasses and parts thereof thus inspected and condemned shall be destroyed for food purposes by the said establishment in the presence of an inspector, and the Secretary of Agriculture may remove inspectors from any such establishment which fails to so destroy any such condemned carcass or part thereof, and said inspectors, after said first inspection, shall, when they deem it necessary, reinspect said carcasses or parts thereof to determine whether since the first inspection the same have become unsound, unhealthful, unwholesome, or in any way unfit for human food, and if any carcass or any part thereof shall, upon examination and inspection subsequent to the first ex-

and condemned' all material found to be unsound, unhealthful, unwholesome, or otherwise unfit for manufacture into human food; and all material thus inspected and condemned shall be destroyed for food purposes by the said establishment in the presence of an inspector, and the Secretary of Agriculture may remove inspectors from any such establishment which fails to so destroy any such condemned material, and said inspectors, after said first inspection, shall, when they deem it necessary, reinspect said material to determine whether since the first inspection the same have become unsound, unhealthful, unwholesome, or in any way unfit for manufacture into human food, and if any material shall, upon examination and inspection subsequent to the first examination and inspection, be found to

amination and inspection, be found to be unsound, unhealthful, unwholesome, or otherwise unfit for human food, it shall be destroyed for food purposes by the said establishment in the presence of an inspector, and the Secretary of Agriculture may remove inspectors from any establishment which fails to so destroy any such condemned carcass or part thereof.

be unsound, unhealthful, unwholesome, or otherwise unfit for manufacture into human food, it shall be destroyed for food purposes by the said establishment in the presence of an inspector, and the Secretary of Agriculture may remove inspectors from any establishment which fails to so destroy any such material."

The Twentieth Annual Report of the Bureau of Animal Industry was made by D. E. Salmon, Chief of Bureau to Hon. James Wilson, Secretary of Agriculture, under date of May 10, 1904.

The following excerpts are taken from the topic:

## "THE WORK OF THE DAIRY DIVISION"

(P. 33) "The chief distinction between the work of the Dairy Division during the fiscal year ended June 30, 1903, and that of preceeding years has been the additional duty assgned to it in connection with the administration of those parts of the Act of Congress approved May 9, 1902, under which certain duties devolve upon the Secretary of Agriculture concerning the manufacture, interstate commerce, and export of renovated butter.

"In preparation for this service a code of regulations for the execution of the law stated, and required by its provisions, was formulated by a joint board composed of representatives of the two Executive Departments concerned, and approved by the Secretary of the Treasury and the Secretary of Agriculture. These regulations were published in the form of Bureau of Animal Industry Order No. 98, dated June 21, 1902, and republished, slightly amended, as Bureau of Animal Industry Order No. 98, dated November 1, 1902.

"So far as they relate to the Department of Agriculture, these regulations are intended for the proper enforcement of the provision and manifest purposes of section 5 of said Act; they contemplate the sanitary inspection of materials, factories and processes necessary to insure a sound and wholesome product and methods of packing and marking the same which will preserve its commercal identity and make renovated butter known to all buyers as distinct from other kinds or grades of butter. The marks, labels or brands required

for this commodity are the same when the subject of interstate commerce as when exported from the United States.

"Various questions have arisen regarding the interpretation and application of these regulations, and for a time there were strenuous efforts made to have them modified. The Secretary of Agriculture, after hearing the various parties concerned and giving full consideration to the subject, decided there was no sufficient cause for change. The regulations promulgated in November are still in force, and during the last few months there have been no remonstrances or complaints regarding them.

"The work of inspecting renovated butter factories and markets was at first assigned to the three inspectors of dairy exports already employed and two additional inspectors temporarily employed for the purpose. It was soon found necessary to double this force, and through the instrumentality of the United States Civil Service Commission a special examination was held in December and a corps of ten dairy inspectors appointed, who were regularly on duty during the latter part of the year. One of these is a temporary appointment (P. 34) Four of these inspectors are not yet on duty during the whole of any one month, but the work in increasing and all will soon be needed for practically their entire time. They may continue, as now, to include in their duty such supervision as is necessary of dairy exports in general and conduct of special dairy investigations.

"These dairy inspectors constitute a body of men of rare experience in the production, testing, grading and handling of dairy products of all kinds, the detection of dairy adulterations, imitations and frauds, and the execution of dairy laws. It would be difficult to find, if needed, an equal number of men of like expert knowledge, skill and tried judgment.

"During the fiscal year 1902-03 these inspectors, assisted to some extent by the Chief and Assistant Chief of the Dairy Division, have repeatedly inspected 82 renovated butter factories and have visited 300 cities and towns in 45 states, territories and the District of Columbia for the purpose of ascertaining the extent to which renovated butter is distributed in domestic markets and the conditions under which this special commodity is sold at wholesale and retail.

"Factories to the number of 82 have been licensed and bonded by the Treasury Depaprtment for the manufacture of renovated butter. They were located in 17 States and the District of Columbia. Of these factories 28 have been in operation throughout the fiscal year, 23 commenced operations subsequent to July, 1902, and continued until the end of June, 1903, and 31 ceased manufacturing before the close of the year.

"The total quantity of renovated butter made at licensed factories during the fiscal year 1902-03 was 54,656,800 pounds. Of this amount about 500,000 pounds remained in possession of the manufacturers, taxes unpaid, at the close of the year. A close estimate of the like manufacture for the fiscal year 1901-02, being the next before the date when a tax was placed upon the product, and based largely upon factory records, shows the output to have been about 50,000,000 pounds, made at 55 factories.

"For the purpose of closer comparison of the product of the two fiscal years mentioned 10 factories have been selected, located in 6 States from which accurate records of the output of both years have been obtained: all were in operation twelve months in each year. The totals are as follows: Ten factories produced in 1901-02, 17,082,274 pounds; the same factories produced in 1902-03, 18,609,718 pounds.

"The business thus increased 9 per cent in volume. It is shown by this comparison, as well as by other facts

of record, that the law in question has not been obstructive and has proved no hindrance to manufacturers who have cheerfully acquiesced in its provisions and energetically conducted their business.

"During the first year of the operation of the law officers of the (P. 35) Department have inspected 144 different lots of renovated butter about to be exported to foreign countries, comprising 23,820 packages and approximately 1,312,000 pounds.

(The next paragraph relates to the retail trade and is omitted here.)

"The quality of renovated butter has been much improved. The difference between the average quality of the product during the past year and the same commodity a few years ago is very marked. This is due to improved machinery and processes, and also to the better average quality and condition of the packing stock or raw material used. The development of the business, with wider distribution and better organization and natural competition among manufacturers, have prevented the former accumulations of country butter at remote points, kept the stock comparatively well cleared up, and resulted in (P. 36) some improvements in packages, packing and transportation to factories or to markets. The average character and condition of the material used in this manufacture is therefore decidedly better than formerly. *Occasionally a lot of packing stock is found in such a condition of filth or putrefaction as to necessitate condemnation. In two instances material of this character has been manufactured before being seen, so the finished product had to be condemned as unfit for food. In such cases inspectors have required that material and product be disposed of as grease.* But these instances are very exceptional. There is still opportunty for great improvement in materials, in the manner of handling the same, and in the finished product, but, as a rule, manufacturers are endeavoring

to improve conditions at all points and are ambitious to win a reputation for producing an article of high quality.

"Renovated butter reaches market in various grades as to quality, the same as other butters. There are products, good, bad and indifferent from different factories and sometimes from the same factory. Renovated butter generally ranks as the equal of creamery butter of "seconds" grade in quality and price, and sometimes it is as good as creamery "firsts." Recently, when creamery "extras" (highest grade) were selling in New York at 20 cents wholesale, the best grade of renovated commanded 18 cents. One case is known where 700 packages of creamery butter of "firsts" grades were sold by the makers for 16½ cents per pound, when the same manufacturers were readily selling their best renovated product at 17 cents. The best renovated goods compare favorably with the general run of best dairy or farm butter in the market, although the latter usually sells a shade higher. The position of renovated butter in the general market is becoming more and more fixed."

(P. 37) "In the administration of that portion of the law regarding renovated butter which is assigned to the Department of Agriculture during this first year after going into effect many allowances have been made for errors and omissions in observing the regulations, due to the novelty of the subject, misunderstandings and inadvertence, and even in cases of indifference and negligence. It is believed that after one full year's experience in operating factories under the law, with repeated visits and explanations from inspectors, in addition to printed instructions and special correspondence, it is time more strictly to enforce the reasonable regulations and time to make the sanitary inspections more effective."

In the same Report of the Bureau of Animal Industry, commencing on page 177 is an interesting chapter entitled: FACTS CONCERNING THE HISTORY, COMMERCE AND MANUFACTURE OF BUTTER, by Harry G. Hayward, M. S., Ass't. Chief, Dairy Division.

Under the topic BUTTER SUBSTITUTES (page 193) it is said:

"At the present time there are three commercial substitutes for butter as it comes from the creamery or dairy churn. These are oleomargarine, butterine and renovated butter. These substitutes are manufactured and sold under the surveillance of the United States Government, and are subject to special taxes.

"Renovated Butter is made 'from one or more lots of butter which have been subjected to any process by which it is melted, clarified, or refined' for the purpose of removing rancidity, or any deleterious flavors, *or of otherwise improving and rendering uniform miscellaneous lots of butter which could not find a profitable market without being subjected to some such process of renovation.* It is understood that renovated butter is pure butter, *but is made from stock that in itself is not fit for table use.* The purpose of Government surveillance is to see that regulations are observed *whereby no unwholesome material* or process *is used* and so that the purchaser and consumer are advised as to the true character of this kind or grade of butter."

## CERTIFICATE OF COUNSEL

I hereby certify that I have mailed the Attorney General of Alabama a copy of the foregoing brief at his post office address in Montgomery, Alabama, postage paid, on this ..... day of December, 1941.

.....

HORACE C. WILKINSON,
*of Counsel for*
*Petitioner-Appellant.*

# Supreme Court of the United States

OCTOBER TERM 1940

NO. 781

CLOVERLEAF BUTTER COMPANY, A CORPORATION,

*Petitioner,*

*vs.*

HAYGOOD PATERSON, as Commissioner of Agriculture & Industries of the State of Alabama, et. al.,

*Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THOMAS S. LAWSON,
*Attorney General of Alabama*

WILLIAM H. LOEB,
*Assistant Attorney General,*

Counsel for Respondents.

# INDEX

## SUBJECT INDEX


Page

Opinion below ..... 1
Jurisdiction ..... 2
Statement of the case ..... 3
Argument ..... 6

I. The decision of the Court of Appeals in this cause is in accord with the applicable decisions of this Court ..... 6

A. The protection and promotion of the health of its citizens is an inherent power of the State of Alabama, and so long as the exercise of this power does not conflict with the Constitution or statutes of the Central Government, the State of Alabama may act without limitation, even though its action may directly affect interstate commerce. ..... 6

B. Congress has not occupied the field by the Renovated Butter Act, nor has it, by such Act, regulated interstate commerce to the exclusion of state action ..... 10

1. The Renovated Butter Act is not intended as a regulation of commerce. It is a revenue measure. Its field of activity has long since been delineated by this Court ..... 10

Page

2. Assuming that the Renovated Butter Act was intended as a regulation of commerce, Congress has specifically indicated its will that interstate commerce in renovated or process butter may be subjected to restrictions by the State ..... 18

3. Assuming that the Renovated Butter Act is a "regulation of commerce" and that Congress has not specifically indicated its will to allow state restrictions, nevertheless the Act does not operate to render inoperative the State's right of action in cases of this kind ..... 26

II. The Circuit Court of Appeals did not erroneously fail to follow the construction placed on the Agricultural Code by the Supreme Court of Alabama in State vs. Cecil, 216 Ala. 391 ..... 37

Conclusion ..... 40

Page

TABLE OF CASES CITED.

Adams Express Co. v. Croninger, 226 U. S. 491 ..... 27, 31

Asbell vs. Kansas, 209 U. S. 251 ..... 33

Austin vs. Tennessee, 179 U. S. 343, 363 ..... 20

Bacon vs. Illinois, 227 U. S. 504, at p. 516 ..... 39

Brown vs. Houston, 114 U. S. 622 ..... 30

Charleston & W. C. R.R. Co. v. Varnville Furniture Co., 237 U. S. 597 ..... 27

Chicago Board of Trade vs. Olsen, 262 U. S. 1 ..... 39

Clarke Distilling Company vs. Western Maryland Ry. 242 U. S. 311 ..... 24, 26

Clason v. Indiana, 306 U. S. 439 ..... 7

Cloverleaf Butter Co. v. Paterson, 116 Fed. 2d. 227 ..... 1

Corn Products Ref. Co. vs. Eddy, 249 U. S. 47 ..... 7, 33

C. R. I. & P. Co. v. Hardwick Co., 226 U. S. 426 ..... 27, 31

Crossman vs. Lurman, 192 U. S. 189 ..... 7, 33

Currin vs. Wallace, 306 U. S. 1 ..... 29

Dahnke-Wallace Milling Co. vs. Bondurant, 257 U. S. 282 ..... 39

Dent vs. West Virginia, 129 U. S. 114, 122 ..... 8

Page

Eichholz v. Public Service Commission of Missouri, 306 U. S. 268, at page 274 ..... 7

Erie R. R. v. New York, 233 U. S. 671 ..... 27

Erie R. R. Co. v. Winfield, 244 U. S. 170 ..... 27

Federal Trade Commission v. Bunte Bros. Inc., No. 85, decided February 17, 1941 ..... 26

Gibbons vs. Ogden, 9 Wheat. 1, 204 ..... 15

Gilman vs. Philadelphia, 3 Wall. 713 ..... 30

Hebe Co. vs. Shaw, 248 U. S. 297 ..... 33

Hines v. Davidowitz No. 22, 85 L. ed. 366, 372 ..... 28, 36

In Re Kollock, 165 U. S. 526, 533 ..... 12, 14

In Re Rahrer, 140 U. S. 545 ..... 23, 24

Kelly vs. Washington, 302 U. S. 1, at p. 14 ..... 3, 14, 28, 33

Leisy vs. Hardin, 135 U. S. 100 ..... 30

L. & N. R. R. Co. v. State, 16 Ala. App. 199 ..... 27

License Tax Cases, 5 Wall. 462, 473 ..... 16

Magnano Co. vs. Hamilton, 292 U. S. 40, 47 ..... 14

Maurer vs. Hamilton, 309 U. S. 598 ..... 33

McCray vs. U. S., 195 U. S. 27, 59 ..... 12, 13

McGuire vs. The Commonwealth, 3 Wall. 382, 395 ..... 16

Merchants Exchange vs. Missouri, 248 U. S. 365 ..... 33

Minnesota Rate Cases, 230 U. S. 352, 398-412 ..... 6, 39

Page

Mintz vs. Baldwin 289 U. S. 346 ..... 28, 29, 30, 31, 33
Missouri P. R. Co. vs. Norwood; 283 U. S. 249, 257 ..... 33, 35
Missouri-Pacific R. R. v. Stroud, 267 U. S. 404 ..... 27
Missouri Pacific vs. Porter, 273 U. S. 341 ..... 28, 31
Napier v. Atl. Coast Line R. R. Co., 272 U. S. 606 ..... 27, 29, 30, 31
Nelson vs. Sears Roebuck & Co., No. 255 ..... 36
New York Central R. R. v. Winfield, 244 U. S. 147 ..... 27
Northern Pacific R. R. v. Wash., 222 U. S. 370 ..... 27
Oregon-Wash. R.R. Co. v. Wash., 270 U. S. 87 ..... 28, 32, 35
Pacific States Co. vs. White, 296 U. S. 176, 181, 182 ..... 9, 28, 33, 35
Pervear vs. The Commonwealth, 5 Wall. 475, 479 ..... 16
Plumley vs. Massachusetts, 155 U. S. 461 ..... 7, 8, 12, 17, 19, 33
Polk Co. vs. Glover, 305 U. S. 5, 11, 15 ..... 9, 35
Powell vs. Pennsylvania, 127 U. S. 678 ..... 7, 33
Prigg vs. Pennsylvania, 16 Peters 539 ..... 32
Reid vs. Colorado, 187 U. S. 137 ..... 33
Robbins vs. Shelby County Taxing Dist., 120 U. S. 489 ..... 30
Savage vs. Jones, 225 U. S. 501 ..... 7, 20, 33
Schollenberger vs. Pennsylvania, 171 U. S. 1, 28 ..... 20, 22

Page

Sligh vs. Kirkwood, 237 U. S. 52 ..... 33, 34

Smith vs. Alabama, 124 U. S. 465, 482 ..... 39

South Carolina Highway Department vs. Barnwell Bros., 303 U. S. 177, 184, 188-191 ..... 6, 28, 33, 39

Southern R. R. v. Reid, 222 U. S. 424 ..... 27

Stafford vs. Wallace, 258 U. S. 495 ..... 39

State vs. Cecil, 216 Ala. 391 ..... 37

Townsend vs. Yeoman, 301 U. S. 441, 454 ..... 29, 33

United States vs. Bohl, 125 Fed. 625 ..... 11, 12

U. S. vs. Nine Barrels of Butter, 241 Fed. 499, 500 9

Weigle vs. Curtice Bros. Co., 248 U. S. 285 ..... 35

Welch Co. vs. New Hampshire, 306 U. S. 72 ..... 33

STATUTES CITED.

Act of May 9, 1902, Chapter 784, 32 State. 193, as amended, Title 26, U. S. C. A., Int. Rev. Code, Chap. 16, Secs. 2320-2327 ..... 2

Alabama Agricultural Code, Secs. 36, 37, 38, 39 ..... 8, 9

Alabama Agricultural Code, Sec. 217 ..... 3

Alabama Agricultural Code, Sec. 218 ..... 3

General Acts of Alabama, 1923, page 463 ..... 37

Internal Revenue Code, Sec. 3243 ..... 18

Internal Revenue Code, Sec. 3276 ..... 18

Oleomargarine Act of 1886 ..... 12

Renovated Butter Act ..... 12, 18

Wilson Act ..... 22

# Supreme Court of the United States

**OCTOBER TERM, 1940**

---

## NO. 781

---

CLOVERLEAF BUTTER COMPANY, A CORPORATION,

*Petitioner,*

*vs.*

HAYGOOD PATERSON as Commissioner of Agriculture & Industries of the State of Alabama, et. al.,

*Respondents.*

---

**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.**

---

### I.

### OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit, which petitioner is asking this Court to review, is reported in 116 F. (2d) 227.

## II.

### JURISDICTION.

Petitioner seeks to invoke the jurisdiction of this Court to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit rendered on the fourteenth day of January 1941. Petitioner relies upon Section 240 of the Judicial Code as amended by Acts of February 13, 1925, Subsections (a) and (b), seperately and severally (U.S.C.A., Title 28, Sec. 347), and also Rule 38 of the Revised Rules of the Supreme Court of the United States, adopted February 13, 1939.

---

Petitioner bases his claim for relief on the following proposition:

> That Congress, by the enactment of the so-called Renovated Butter Act of May 9, 1902 as amended, U.S.C.A., Internal Revenue Code, Chapter 16, Sections 2320 to 2327, has preempted and completely occupied the field of inspection of country or packing stock butter moving in interstate commerce into Alabama and into petitioner's plant for renovating or processing there into process butter or renovated butter for sale and shipment in interstate commerce, to the exclusion of state regulation.

## III.

## STATEMENT OF CASE.

The Department of Agriculture and Industries of the State of Alabama acting through its Division of Agricultural Chemistry during the period from April, 1939 to June, 1940; seized certain country or packing stock butter belonging to petitioner.* The seizures were made in every instance under authority of Section 217, Agricultural Code of Alabama of 1927 as amended by General Acts, 1935, Sec. 3, pp. 1103 and 1104, and Section 218 of said Agricultural Code of 1927. (See Affidavit for Writ of Attachment for Condemnation, copy of which appears in Appendix, p. 51. The seizures were made in each instance on the theory that such country or packing stock butter was an adulterated food within the meaning of Sections 37, 38, and 39 of the Agricultural Code of Alabama of 1927 (Appendix pages 42, 43) in that it consisted "in whole or in part of a filthy, decomposed or putrid or animal substance or any portion of an animal unfit for food, whether manufactured or not***".

---

*Counsel's intimation that these seizures reversed "the custom and practice of twenty years" (Brief p. 22) is without foundation in the record or elsewhere. Apposite to the implication, and in refutation of it, is the following from this Court's opinion in Kelly vs. Washington, 302 U. S. 1, at p. 14:

> "Much is made of the fact that the state law remained unenforced for a long period. But it did not become inoperative for that reason. Where the state police power exists, it is not lost by non-exercise but remains to be exerted as local exigencies may demand."

On June 28, 1940, there was filed in the United States District Court, Southern Division of the Middle District of Alabama, a complaint seeking a temporary and permanent injunction against the Commissioner of Agriculture and Industries of the State of Alabama and the Director of the Division of Agricultural Chemistry in the Department of Agriculture and Industries of the State of Alabama, to restrain them from enforcing the above noted laws. (R. 2). On the same day, June 28, 1940, the Honorable C. B. Kennamer, Judge of said District Court, entered an order setting the application for preliminary injunction for hearing on the twelfth day of July, 1940, (R. 26).

On July 12, 1940, respondents filed a motion to dismiss the complaint, (R. 45). This motion to dismiss was at first overruled by the District Court, (R. 47). Thereupon the respondents filed an answer and the petitioner moved to strike from the answer filed, certain language set out in the said motion. The Court overruled the motion to strike (See reference in third paragraph of the decree, R. 47), and set Thursday, July 25, 1940 as the time and place for further hearing.

Prior to the date fixed for the further hearing, counsel for the parties agreed to limit the issues to be submitted to the Court by stipulation, in lieu of taking testimony, and to resubmit the cause to the Court on the complaint and the stipulation limiting the issues and the motion to dismiss. Pursuant thereto, the parties entered into such stipulation

(R. 48, 49) and, on the same date, (July 23, 1940) resubmitted the cause to the Court on the complaint and stipulation and the motion to dismiss. On this submission, the Court entered the decree dismissing the bill, (R. 50). Petition for appeal to the United States Circuit Court of Appeals for the Fifth Circuit was duly filed (R. 53) and argued on July 23, 1940, (R. 53).

Upon consideration of the matters and things presented on the appeal, the United States Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court of the United States for the Middle District of Alabama (R. 69), Circuit Judge Hutcheson issuing the opinion (R. 59) with Foster, J. dissenting.

Petitioner's application for rehearing, filed on January 4, 1941, was duly denied by the Circuit Court of Appeals on January 14, 1941, whereupon petitioner applied to this Honorable Court for writ of certiorari.

## ARGUMENT.

## I

## THE DECISION OF THE COURT OF APPEALS IN THIS CAUSE IS IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT.

### A.

**The Protection and Promotion of the Health of its Citizens is an Inherent Power of the State of Alabama, and so long as the exercise of this power does not conflict with the Constitution or Statutes of the Central Government, the State of Alabama may act without limitation, even though its action may directly affect Interstate Commerce.**

The general principles covering the exercise of State authority when interstate commerce is affected, have been repeatedly stated by this Court. Many cases are collated in the opinions in the *Minnesota Rate Cases*, 230 U. S. 352, 398-412, and *South Carolina Highway Department vs. Barnwell Bros.*, 303 U. S. 177, 184, 188-191.[1]

From the authorities collated in these decisions it is apparent that State statutes designed to safe-

[1] While other cases might be cited, we deem it inadvisable to unnecessarily burden this brief with them, since these two cases deal at length with most of the pertinent decisions.

"all articles of food, drink, confectionery, or condiment, whether simple, mixed, or compound, used or intended for use by man or domestic animals."[4]

In Section 39 it is stated that an article shall be deemed adulterated in the case of food,

"if it consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance or any portion of an animal unfit for food, whether manufactured or not***".

These regulations, it is submitted, were imposed by the Legislature of Alabama in accordance with its constitutional right to determine the policy which it believed would protect the health of the people of the State of Alabama and safeguard them from fraud and imposition.[5]

---

[4] NOTE that in U. S. vs. Nine Barrels of Butter 241 Fed. 499, 500, District Judge Learned Hand writing to the question of whether packing stock butter should be considered as "food" stated:

"Doubts may arise, where goods are shipped in interstate commerce, which may or may not be articles of food, as their ultimate destination may determine; but this case does not raise them. By no chance can this butter be called anything but an article of food; by no chance can I avoid the conclusion that it was filthy and decomposed in part. As such it came within the terms of the statute, even though it might be saved and reclaimed by being made clean and palatable".

[5] Cf. Pacific States Co. vs. White 296 U. S. 176, 181, 182. Also, compare logic of Mr. Justice Black in the dissent in Polk Co. vs. Glover, 305 U. S. 5, 11, 15.

It can be concluded, therefore, that these regulations, being enacted under the police power of the State, may be effective upon the subjects sought to be regulated even though they may incidentally affect interstate commerce.

This conclusion is based, of course, upon the assumption of an absence of Federal legislation covering the field. Whether the Renovated Butter Act of 1902 preempts state action is therefore to be considered.

B

**Congress has not occupied the field by the Renovated Butter Act, nor has it, by such Act, regulated Interstate Commerce to the exclusion of State action.**

1.

*The Renovated Butter Act is not intended as a regulation of commerce. It is a revenue measure. Its field of activity has long since been delineated by this Court.*

It is earnestly contended by petitioner that Congress has preempted the field of inspection of country or packing stock butter in interstate commerce going into the manufacture of process butter for sale and shipment in interstate commerce. Counsel for petitioner, on p. 16 of their brief in support of petition for writ of certiorari, state:

"The question of whether or not Congress has preempted and completely occupied the field

of inspection or regulation of the raw materials in interstate commerce, going into the manufacture of process butter for sale and shipment in interstate commerce, necessarily calls for a construction of the Acts of Congress known as the Renovated Butter Act. It may be appropriately asked, 'What has Congress done about this matter?' "

Counsel then proceed to conclude that the Renovated Butter Act, and the regulations promulgated pursuant thereto, indicate that Congress has completely occupied the field of inspection or regulation in this regard. Counsel, as their major premise, announce:

"The main purpose of the Renovated Butter Act was:

> 'To provide for the sanitary inspection of such butter at the place of manufacture, and to take every precaution in order that none shall be shipped from the factory which can in any way be injurious to the health of the consumers'.

United States vs. Bohl, 125 Fed. 625."[6] (Brief p .10)

We earnestly submit, however, that the argument of counsel is specious, in that it erroneously assumes the basic purpose of the Renovated Butter Act and the regulations promulgated pursuant thereto.

It is to be remembered that the Renovated Butter Act of 1902, 32 Stat. 193, was but an amendment and an extension of the Oleomargarine Act of 1886, 24 Stat. 209. This Court, in considering the Act of 1886 in *In Re Kollock*, 165 U. S. 526, 537 observed:

---

[6] Although the quotation from United States vs. Bohl 125 Fed. 625, appearing on p. 10 of counsel's brief, appears to be a full sentence—as quoted by counsel—the reported decision shows that the full sentence is as follows:

> "It is equally clear that the purposes of the **section** are to provide for the sanitary inspection of such butter at the place of manufacture, and to take every precaution in order that none shall be shipped from the factory which can in any way be injurious to the health of the consumers".

This conclusion of the District Judge is limited to a particular section of the Act, not the entire Statute, and must be considered in the light of the statements of this Court that the motive or purpose of Congress in adopting the Renovated Butter Act may not be inquired into, but in considering the Act, the Act as a whole must be dealt with and its scope and effect considered. McCray vs. U. S. 195 U. S. 27, 59. This Court looking at the Act in its entirety, has held that the regulations were in execution of or supplementary to, but not in conflict with the law itself, being specifically authorized thereby in effectuation of legislation imposing the tax. In Re Kollock 165 U. S. 526, 533; Plumley vs. Massachusetts 155 U. S. 461.

"The oleomargarine legislation does not differ in character from this, and the object is the same in both, namely, to secure revenue by internal taxation and to prevent fraud in the collection of such revenue. *Protection to purchasers in respect of getting the real and not a spurious article cannot be held to be the primary object in either instance,* and the identification of dealer, substance, quantity, etc., by marking and branding *must be regarded as means to effectuate the objects of the act in respect of revenue.*" (Emphasis supplied)

At the October Term, 1903, there was presented to this Court, in *McCray vs. United States*, 195 U. S. 27, the validity of the 1902 Act. Mr. Justice White, in speaking for the Court, in his summary of the provisions of the 1902 Act, notes:

"The section in question (Sec. 1) as well as those following it, contain many administrative provisions for the enforcement of the taxes levied by the Act and concerning interstate and foreign commerce in the articles referred to".

The Court, in reaching the conclusion that the Act was constitutional and that it was not an unwarranted encroachment upon, and an interference with the police powers reserved to the several states and to the people of the United States, concluded:

"*In determining whether a particular Act is within a granted power, its scope and effect*

*are to be considered.* Applying this rule to the acts assailed, it is self-evident that on their face, they levy an excise tax. That being their necessary scope and operation, it follows that the acts are within the grant of power." (195 U. S. 59) (Emphasis supplied)

It is to be noted that the Court declined to consider the contention urged upon it, that the motive of Congress was to regulate and not to tax, and rested the decision upon the conclusion reached by Mr. Chief Justice Fuller in *In Re Kollock* (165 U. S. 536) that

> "The Act before us is on its face, an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue".

Thus it appears that the intention of Congress, in enacting this statute, must be derived from the language of the whole act. The mere fact that a provision for regulation is included in the statute is certainly no indication, in and of itself, that Congress intended to preempt the field of regulation, but must, we submit, be considered only as a provision by Congress for the enforcing of its taxing statutes.[7, 8]

---

[7] Cf. Magnano Co. vs. Hamilton 292 U. S. 40, 47.

[8] In Kelly. v. Washington, 302 U. S. 1, at page 13, it is observed: "The fact that federal regulations were (are) numerous and elaborate does not extend them beyond the boundary they established."

This Court, as appears from the foregoing authorities, in determining the essential character of legislation, seems to view it, not objectively, i.e., merely by looking at the scope of its operation, but attempts to seek out the essential character of the legislation. As Chief Justice Marshall comments, in *Gibbons vs. Ogden*, 9 Wheat. 1, 204

> "All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical".

The same idea appears in the concurring opinion of Justice Johnson at p. 235. He there says,

> "It is no objection to the existence of distinct, substantive powers, that, in their application, they bear upon the same subject * * *. Their different purposes mark the distinction between the powers brought into action; and while frankly exercised, they can produce no serious collision".

It is submitted, therefore, that the legislation referred to as the Renovated Butter Act of 1902, is to be considered in the light of its primary purpose, i.e., the levy of taxes, and the incidental regulation of the field to which such taxes apply should not be considered by this Court as an indication on the part of Congress that it intends to preempt the State's regulatory rights under its police power.

Counsel's intimation that the State is excluded from the field because a tax is paid by petitioner is obviously unsound. It has been long since settled that the mere licensing or taxing of the products sold gives no right to keep or sell such property in violation of the State law.[9] In the *License Tax Cases* (5 Wall. 462, 473) it was held that a license by Congress upon the persons engaged in the business of sale of lottery tickets and retail dealers in liquors, did not operate to preclude state regulation of such trade. The statement of the Court, found at p. 473, is particularly apposite here:

> "There is nothing hostile or contradictory, therefore, in the Acts of Congress to the legislation of the states. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction, and tend to the same result. It would be a judicial anomaly, as singular as indefensible, if we should hold a violation of the laws of the State to be a justification for the violation of the laws of the Union."

---

[9] McGuire vs. The Commonwealth, 3 Wall. 382, 395; Pervear vs. The Commonwealth, 5 Wall. 475, 479.

We, therefore, earnestly submit that the Court of Appeals correctly held that the Renovated Butter Act could not be considered as preempting the field, since we think it was clearly the intention of Congress not to regulate commerce by such act, but merely to impose a tax upon articles which it found should bear a portion of the nation's tax burden.

The Court's decision finds further support in the following statement of this Court in *Plumley vs. Massachusetts*, 155 U. S. 461, 466:

> "Nor was the Act of Congress (the Oleomargarine Act of 1886 in 24 Stat. 209) relating to oleomargarine intended as a regulation of commerce among the States. Its provisions do not have special application to the transfer of oleomargarine from one State of the Union to another. They relieve the manufacturer or seller, if he conforms to the regulations prescribed by Congress or by the Commissioner of Internal Revenue under the authority conferred upon him in that regard, from penalty or punishment so far as the general government is concerned, but they do not interfere with the exercise by the States of any authority they possess of preventing deception or fraud in the sales of property within their respective limits."

*Assuming that the Renovated Butter Act was intended as a regulation of commerce, Congress has specifically indicated its will that interstate commerce in renovated or process butter may be subjected to restrictions by the State.*

Without waiving the position which we have taken above under the foregoing Proposition 1, we further submit that, assuming that the Renovated Butter Act was intended as a regulation of commerce, there is no ground to suppose that Congress intended in that enactment to interfere with the exercise by the States of any authority they could rightfully exercise over the manufacture or sale within their respective limits, of the articles defined as process or renovated butter.

The Renovated Butter Act, as above noted, imposes certain special taxes upon manufacturers of renovated or process butter, as well as upon wholesale or retail dealers in that product. It is expressly declared (Section 4, 32 Stat. 195)

> "And Sections * * * 3243[10] of the Revised Statutes of the United States are, so far as applicable, made to extend to and include and apply to the special taxes imposed by this section and to the persons upon whom they are imposed."

---

[10] Section 3243 of the Revised Statutes, Title Internal Revenue, is carried forward in the exact language as Section 3276 of the United States Internal Revenue Code of 1939 (U. S. C. A., Title 26), and is still in full force and effect.

Section 3243 of the Revised Statutes of the United States is as follows:

> "The payment of any tax imposed by the internal revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State or in places prohibited by municipal law; nor shall the payment of any such tax be held to prohibit any State from placing a duty or tax on the same trade or business, for State or other purposes."

This Court has heretofore had occasion to consider the purpose of Congress in incorporating into a statute the provisions of Section 3243 of the Revised Statutes.

In *Plumley vs. Massachusetts*, supra, p. 466, it is stated:

> "It is manifest that this section was incorporated into the act of August 2, 1886, to make it clear that Congress had no purpose to restrict the power of the States over the subject of the manufacture and sale of oleomargarine within their respective limits. The taxes prescribed by that act were imposed for national purposes, and their imposition did not give authority to those who paid them to engage in the manufacture or

sale of oleomargarine in any State which lawfully forbade such manufacture or sale, or to disregard any regulations which a State might lawfully prescribe in reference to that article."

Attention is particularly directed to the fact that the Plumley case was decided some six years before the enactment of the Renovated Butter Act of 1902. It must be assumed, under the well established rule of statutory construction, that Congress, in inserting the provision above quoted in Section 4 of the Renovated Butter Act of 1902, intended that a construction should be placed upon it similar to that given the identical provision in the Plumley case.

With this fact in mind, it is respectfully submitted that this Court can reach no other conclusion than that Congress intended to make it clear that the power of the States over the subject of the manufacture and sale of process and renovated butter within their respective limits was to be unrestricted, even though the effect of such regulation might be the imposition of an indirect burden upon interstate commerce.[11]

The incorporation into the Renovated Butter Act of Section 3243 of the Revised Statutes, Title Internal Revenue, is not the only specific indication of the Congressional intention not to restrict the

---

[11] Austin vs. Tennessee, 179 U. S. 343, 363; Schollenberger vs. Pennsylvania, 171 U. S. 1, 28; Savage vs. Jones 225 U. S. 501.

State in the exercise of its lawful police power. A further indication of the will of Congress that interstate commerce might be subjected to restrictions on the part of the States, with respect to the regulation of process or renovated butter, is the provision contained in Section 1 of the Act:

> "That all articles known as oleomargarine, butterine, imitation, process, renovated, or adulterated butter, or imitation cheese, or any substance in the semblance of butter or cheese not the usual product of the dairy and not made exclusively of pure and unadulterated milk or cream, transported into any State or territory or the District of Columbia, and remaining therein for use, consumption, sale, or storage therein, shall, upon the arrival within the limits of such State or Territory or the District of Columbia, be subject to the operation and effect of the laws of such State or Territory or the District of Columbia, enacted in the exercise of its police power to the same extent and in the same manner as though such articles or substances had been produced in such State or Territory or the District of Columbia, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." (32 Stat. 193)

Here again, we find Congress adapting to the Renovated Butter Act of 1902, the provisions of another statute which had been construed by this Court. The provisions of Section 1 of the Renovated Butter Act are identical in every respect (save the

changes made to conform the provisions to the nature of the subject dealt with) to the provisions of the Act of Congress of 1890, the so-called Wilson Act (26 Stat. 313) which provided:

> "That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." (p. 205)

The obvious purpose of inserting Section 1 into the Renovated Butter Act of 1902 was to clearly assert the Congressional intention that the State might act to protect the health of its citizens with respect to unclean butter, even though such butter might still remain in the original packages in which it had been introduced into the State. As a practical matter, it may be observed that Section 1 was inserted to avoid the decision of this Court in *Schollenberger vs. Pennsylvania*, 171 U. S. 1, supra.[12]

---

[12] Indicative of the Congressional thought concerning the addition of Section 1 to the Renovated Butter Act of 1902, are the statements of Sen. Spooner, an advocate of the bill. (Congressional Record, Senate Volume 35, Part 4, pp. 3604, 3605, Fifty-seventh Congress 1st Session). (See Appendix page 47).

In *In Re Rahrer* 140 U. S. 545, this Court, in considering the effect of the provision of the Wilson Act above quoted, after noting that the act provided that imported liquors should be subject to the operation and effect of the State laws to the same extent and in the same manner as though the liquors had been produced in the State, observed:

> "Petitioner was thereby prevented from claiming the right to proceed in defiance of the law of the State, upon the implication arising from the want of action on the part of Congress up to that time. The laws of the State had been passed in the exercise of its police powers, and applied to the sale of all intoxicating liquors whether imported or not, there being no exception as to those imported, and no inference arising, in view of the provisions of the state constitution and the terms of the law, (within whose mischief all intoxicating liquors came), that the State did not intend imported liquors to be included. We do not mean that the intention is to be imputed by violating any constitutional rule, but that the State law should not be regarded as less comprehensive than its language is, upon the ground that action under it might in particular instances be adjudged invalid from an external cause.
>
> "Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to

the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction." (140 U. S. 564)

A like conclusion is reached in *Clarke Distilling Company vs. Western Maryland Ry.* 242 U. S. 311, involving the so-called Webb-Kenyon Law.[13]

It must be remembered, too, that the Renovated Butter Act of 1902 is captioned,

> "An act to make oleomargarine, and other imitation dairy products, subject to the laws of any State or Territory or the District of Columbia into which they are imported."

It is earnestly submitted that each of the provisions of the statute and the title of the statute, to which reference has been hereinabove made, clearly indicate that Congress was not concerned with interfering, nor in attempting to interfere, with any of the States in the matter of regulating the purity of the kind of product here considered.

But, it is argued by petitioner, Congress did not, by the insertion of the foregoing provisions, make raw materials moving in interstate commerce, for manufacture into process butter, subject to state laws. The weakness of this contention is self-apparent. This Court, in *In Re Rahrer*, 140 U. S. 545, 557, recognized the right of a State, as an incident

---

[13] 37 Stat. 699 (1913)

to its power to regulate, to "use means to ascertain the fact". Of consequence, it follows, as observed by the Circuit Court of Appeals of the Fifth Circuit, in its opinion in this cause, that it should not be implied from the statute that the Congress which had declared that the finished product, when introduced into a State, would be subject to the laws of that State, intended by that same act to exclude the State of manufacture from the regulation of ingredients used in the manufacture, with the result that persons might set up as manufacturers in particular states under the protection of Congress and then import into them and use, in the manufacture of food products therein, impure or unfit products, free from inspection by and regulations of, the State, designed to prevent such importation and use.

Or, in other words, stating the necessary result of the argument of counsel from a concrete consideration of the particular subject here involved, that though Congress, in enacting the Renovated Butter statute, had considered the nature and character of our dual system of government, State and Nation, and instead of absolutely prohibiting, had so conformed its regulation as to produce cooperation between the local and national forces of Government, to the end of preserving the rights of all, it had thereby removed from the States control over the packing stock butter which might or might not later be used in the manufacture of process or renovated butter shipped in interstate commerce. The abnormal result to which this argument leads is at once apparent. It was obvious to the Circuit Court of Ap-

peals, and it can be none the less obvious to this Court, that the argument of petitioner virtually comes to the assertion that in some undisclosed way, by the exertion of Congressional authority, seeking to convey additional powers to the States, or to remove restrictions on existing powers, power once possessed by the State of Alabama, has evaporated.[14]

It is, therefore, earnestly insisted that since Congress has clearly indicated its recognition of the right of the State of Alabama to regulate the manufacture and sale of renovated or process butter, the Court of Appeals was correct in declining to find in the statute radiations beyond the obvious meaning of the language therein used.[15]

3.

*Assuming that the Renovated Butter Act is a "regulation of commerce" and that Congress has not specifically indicated its will to allow state restrictions, nevertheless the Act does not operate to render inoperative the States' right of action in cases of this kind.*

Under Propositions 1 and 2, we have proceeded on the theory that the proper point of beginning in the consideration of the scope of any disputed

---

[14] Cf. the logic employed by Chief Justice White in Clark Distilling Co. vs. Western Maryland Ry., 242 U. S. 311, 327-28.

[15] Federal Trade Commission v. Bunte Bros. Inc., No. 85, decided February 17, 1941.

statute is with the words of the statute itself. It is submitted that we have successfully shown that the words of the Renovated Butter Act of 1902 specifically indicate a Congressional intention to permit State action in matters of this kind. But counsel for petitioner is earnestly contending that the words themselves are not sufficiently definite to indicate an intention on the part of Congress to permit such regulations. In support of this argument, that the Renovated Butter Act excludes the inspection of packing stock butter in interstate commerce by state officers, counsel cite the following authority:

Napier v. Atl. Coast Line R.R. Co., 272 U. S. 606;
Northern Pacific R.R. v. Wash., 222 U. S. 370;
Southern R.R. v. Reid, 222 U. S. 424;
Missouri-Pacific R.R. v. Stroud, 267 U. S. 404;
L. & N. R.R. Co. v. State, 16 Alabama, App. 199;
C. R. I. & P. Co. v. Hardwick Co., 226 U. S. 426;
Adams Express Co. v. Croninger, 226 U. S. 491;
Erie R.R. v. New York, 233 U. S. 671;
New York Central R.R. v. Winfield, 244 U. S. 147;
Erie R.R. Co. v. Winfield, 244 U. S. 170;
Charleston & W. C. R.R. Co. v. Varnville Furniture Co., 237 U. S. 597;

Hereinafter called the "Railroad Cases".

Hines v. Davidowitz (MMS) 61 Sup. Ct. Rep. 399;
Oregon-Wash. R.R. Co. v. Wash., 270 U. S. 87;
Mo. Pac. Co. v. Porter, 273 U. S. 341.
(Petitioner's Brief, pp. 2 and 3.)

It will not be here denied that in each of the foregoing cases, this Court has held a Federal statute exclusive in its own field. It will not be denied that in each of the cases State action has been held to have been superseded by Federal legislation.

Let us, however, analyze the cases cited by counsel in the light of the statement of this Court in *Hines vs. Davidowitz*, No. 22, decided January 20, 1941, 85 L. ed. 366, 374, that,

> "The nature of the power exerted by Congress, the object sought to be obtained, and the character of the obligations imposed by the law, are all important in considering the question of whether Supreme Federal requirements preclude enforcement of State laws on the same subject".

Counsel is insisting that the Circuit Court of Appeals fell into error in applying to the facts in this case, as analogous, the cases of *Mintz vs. Baldwin*, 289 U. S. 346; *Pacific States Co. vs. White*, 296 U. S. 176; *Kelly vs. Wash.*, 302 U. S. 1; *S. C. Highway Department vs. Barnwell Bros.* 303 U. S. 177;

*Townsend vs. Yeoman*, 301 U. S. 441; and *Currin vs. Wallace*, 306 U. S. 1, rather than the cases upon which petitioner now relies.

But, is there not actually a vast disparity of both fact and logic in the two lines of cases?

Typical of the cases cited by petitioner, is the *Napier* case, 272 U. S, 606. Typical of the cases relied on by the Court of Appeals and by respondent, is *Mintz vs. Baldwin*, 289 U. S. 346. Let us examine these two cases and the rationale of each. Let us compare them in their essential facts.

The *Napier* case concerned itself with the construction of the Federal Locomotive Boiler Inspection Act. The question was whether that act had occupied the field of regulating locomotive equipment used on a highway of interstate commerce so far as to preclude State legislation.

The *Mintz* case considered the Cattle Contagious Diseases Acts. The question there was whether those acts precluded State legislation on like subjects.

In the *Napier* case, the State of Georgia had enacted statutes prescribing an automatic door to the fire box and a cab curtain for use on locomotives. In the *Mintz* case, the State of New York had enacted a statute requiring that cattle should not be imported for dairy or breeding purposes without a certificate certifying them to be free from disease.

In neither the *Napier* case nor the *Mintz* case had Congress, by specific language directed to that end, covered the particular action taken by the State.

But in the *Napier* case it was held that the Boiler Inspection Act "was intended to occupy the field", whereas in the *Mintz* case, the Court declined to find that the entire field had been occupied, and, instead, found a field of operation for the State statute.

Why this distinction?

In the *Mintz* case it is stated,

> "The purpose of Congress to supersede or exclude State action against the ravages of disease is not lightly to be inferred. The intention so to do must definitely and clearly appear".

It is to be seen, therefore, that the cases fall into several different categories.

In the first category, it seems, are those cases where the power of Congress is absolutely exclusive. These are the cases where the subjects are national in their character or admit only of one uniform system or plan of regulation. *Gilman vs. Philadelphia*, 3 Wall. 713; *Brown vs. Houston*, 114 U. S. 622; *Leisy vs. Hardin*, 135 U. S. 100; and *Robbins vs. Shelby County Taxing Dist.*, 120 U. S. 489 are a few of the many cases announcing this principle. The case with which we are now concerned obviously does not fall under this first category.

A second classification of cases includes those where matters of local concern are involved. These are the cases with which we now deal. In considering the opinions treating these cases, said to be of local concern, we see that this second classification has been further subdivided by this Court. In one series of cases, the Railroad cases, of which the *Napier* case is typical, the Court has found that Congress has preempted the field. In the other group of cases, of which *Mintz vs. Baldwin* is typical, a different view is obtained. One clue to this distinction has been quoted above from the Mintz case.

A further clue to the basis for the distinctions made is found in *C. R. I. Ry. Co. vs. Hardwick Elevator Co.*, 226 U. S. 426, 435, wherein it is stated that insofar as legislation relating to railroads is concerned, the State "had no inherent, but only permissive power". 226 U. S. 435. In *Adams Express Co. vs. Croninger*, 226 U. S. 491 at p. 506, the Court remarks with respect to the right of the State to regulate the liability of a carrier for a loss or damage to property carried,

> "Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts".

Again, in *Missouri Pacific vs. Porter*, 273 U. S. 341, we find it stated with respect to the power of Congress over railroads, that,

> "Its power to regulate such commerce and all instrumentalities is supreme". 273 U. S. 346.

It will be seen, therefore, that each of the Railroad Cases cited by counsel for petitioner, pivot on the proposition that the State *had no inherent right to regulate the subject*, and that once Congress had spoken, the State must remain inactive. This court has treated these cases as a group and as each new set of facts arises, has applied to it the rules formulated to govern the group.

The fundamental basis of the case of the *Oregon-Wash. R. R. Co. vs. Wash.* 270 U. S. 87, is that the State legislation there considered operated as an actual barrier and as a serious impediment to interstate commerce. Here again we are confronted with a situation involving interference with interstate commerce in a matter of national concern, the statute creating as it did, a substantial—indeed, a practically complete—barrier to the enforcement of such commerce.

The case of *Prigg vs. Pennsylvania*, 16 Peters 539, represents another category into which these cases may be placed. There, the State legislation considered operated in conflict with an implied prohibition in the Constitution. It was there held that a statute of Pennsylvania making it a felony to take and carry negroes for the purpose of returning them as slaves, interfered with the right of the owner to reclaim his slaves, which right was derived from the Constitution of the United States. The line of cases represented by the Prigg case, rest on the proposition that no State may trench on the province of Congress to determine whether the paramount interest of the nation demands nation-wide or local

action—for Congress is particularly charged by the Constitution with the responsibility for these functions of government.

The cases upon which the Circuit Court of Appeals lays its decision fall into an entirely different category. These cases, and others which might have been cited, rest on a construction of statutes involving action by States in matters in which they have an inherent right to act. Matters involving the health of their citizens.[16] Matters involving action by the State directed to the protection of its citizens from fraud and deceit.[17] State measures intended to mitigate the destruction of life, limb, or property and definitely to insure the safety of its citizens.[18]

---

16 Plumley vs. Massachusetts, 155 U. S. 461 (oleomargarine colored to look like butter); Crossman vs. Lurman, 192 U. S. 189 (adulterated coffee; this case involves foreign commerce); Sligh vs. Kirkwood, 237 U. S. 52 (immature citrus fruits unfit for human consumption); Savage vs. Jones, 225 U. S. 501 (involving a statute requiring a statement of ingredients contained in butter products); Asbell vs. Kansas, 209 U. S. 251 (inspection of diseased cattle); Reid vs. Colorado, 187 U. S. 137 (penalizing the importation of cattle).

17 Corn Products Ref. Co., vs. Eddy, 249 U. S. 427 (label of syrup compounds); Hebe Co. vs. Shaw, 248 U. S. 297 (labeling of condensed milk); Merchants Exchange vs. Missouri, 248 U. S. 365 (weighing of grain); Townsend vs. Yeomans, 301 U. S. 441 (maximum charges for the services of warehousemen), Pacific States Co. vs. White, 296 U. S. 176 (regulating standards for the containers in which horticultural products are marketed); Powell vs. Pennsylvania, 127 U. S. 678 (prevention of deception in sales of butter and cheese).

18 Welch Co. vs. New Hampshire, 306 U. S. 72 (regulation of time of service of drivers of motor carriers); S. C. Highway Department vs. Barnwell Bros., 303 U. S. 177 (limitation of width and weight of vehicles used on highways); Maurer vs. Hamilton, 309 U. S. 598 (car over car method of transportation restricted); Kelly vs. Wash., 302 U. S. 1 (prevention of operation of unsafe or unseaworthy vessels); Missouri P. R. Co. vs. Norwood 283 U. S. 249, 257 (safety of train crews).

The right exercised by the State in these cases depended neither on the action, nor on the inaction of Congress. The subjects regulated in each of them were not essentially matters of national concern. The States did not act through the permission of Congress. This is equally true in the instant case. The State of Alabama, through its Department of Agriculture & Industries, is operating to protect the health of its citizens and those of other States[19] from possible injury resulting from the production within the borders of the State of Alabama of impure foods unfit for use. Congress has indicated no intention to regulate the packing stock butter, as such. No authority is granted to the agents of the Federal Government to seize this packing stock butter if it is found to contain matters which might spread disease and pestilence. But, counsel for petitioner argue, Congress has given the right to its agents to seize the finished product and the real danger to the public is in the finished product. That is counsel's conclusion. Such a line of argument, we submit, raises a question of fact which must be resolved in favor of the State. It must be presumed that the Legislature of Alabama, after investigation, determined that its citizens, and those of other States, could best be protected by the seizure of the packing stock butter; that though the impurities in the raw material might not be visible in the finished product, and, therefore, might not subject it to seizure under

---

[19] Cf. Sligh vs. Kirkwood, 237 U. S. 52, 59.

Federal authority, such impurities, nevertheless, might still exist in fact, though not visible.[20]

Moreover, this Court has very aptly stated that,

> "The fact that a food or drug might be condemned by Congress if it passed from State to State, does not carry an immunity of foods or drugs, making the same passage, that it does not condemn".[21]

In considering cases of this type, involving, as they do, an exercise of the police power of the State for the protection of the health of its citizens, this Court has unanimously declared that it must be clear beyond all reasonable doubt that Congress intended to exclude all State action by the enactment of a statute affecting the field.

The test described by able counsel for petitioner as the "Compliance-Defiance" test, far from having been repudiated or rejected in cases involving State action under its police power to protect the health and safety of its citizens under circumstances involving local control, has, on the contrary, been repeatedly reaffirmed. We do not deny that the "Compliance-Defiance" test has not been applied in the Railroad Cases upon which the petitioner relies,[22] or in the case of *Oregon-Wash. R. R. Co., vs. Wash.*,

---

[20] Cf. Pacific States Co. vs. White, 296 U. S. 176 at p. 186; Black, J., Dissenting Opinion in Polk Co. vs. Glover, 305 U. S. 5, 15 et seq.

[21] Weigle vs. Curtice Bros. Co., 248 U. S. 285 at p. 288.

[22] But compare Missouri P. R. Co. v. Norwood, 283 U. S. 249, at p. 257.

270 U. S. 87, involving an absolute restriction on interstate commerce where the Federal Statute was regulatory and obviously covered the entire field. We think, however, that we have successfully shown the factual and legal distinction between these cases and those upon which we rely.

We might also here paraphrase Mr. Justice Douglas' comments in *Nelson vs. Sears Roebuck & Co.*, No. 255, decided February 15, 1941:

> "Particular facts of specific cases determine whether a given statute preempts State regulation indirectly affecting interstate commerce. Hence a review of prior adjudications based on widely disparate facts, howsoever embedded in general propositions, does not facilitate an answer to the present problem."

It is, therefore, earnestly insisted that the State's action, being bottomed on the broad base of the protection of public health, does not stand as an obstacle to the accomplishment of the full execution of the purposes and objectives of the Act of Congress, known as the Renovated Butter Act of 1902, and consequently its exercise should not be restricted by this Court.[23]

---

[23] Cf. Hines vs. Davidowitz No. 22, decided January 20, 1941, 85 L. ed. 366, 372.

## II

## THE CIRCUIT COURT OF APPEALS DID NOT ERRONEOUSLY FAIL TO FOLLOW THE CONSTRUCTION PLACED ON THE AGRICULTURAL CODE BY THE SUPREME COURT OF ALABAMA IN STATE VS. CECIL, 216 ALA. 391.

Petitioner's insistence that the Supreme Court of Alabama in *State vs. Cecil*, 216 Alabama 391, has held that the enactment of the Agricultural Code was within the exercise of the police power of the State, but that the operation of the Code was confined to intrastate commerce, reveals that petitioner has apparently overlooked two facts.

The first fact is that the Supreme Court of Alabama in the Cecil case did not consider the *entire* Agricultural Code, but limited its considerations to Article 23 of the 1923 Act (Act No. 376, H. 570, approved September 27, 1927, General Acts of 1923, p. 463), which act the Court refers to as the "Agricultural Code of 1923".[24] It is obvious that the Agricultural Code of 1927, which became effective on October 1, 1927, could not have been the subject of discussion in a decision rendered on April 7, 1927, as was the decision in the Cecil case. It is clear too, from an examination of the Agricultral Code of

[24] Copies of both the Agricultural Code of 1923 and the Agricultural Code of 1927 have been filed in the office of the Clerk of this Court for convenient reference by the Court.

1927, that Article 23 of the Agricultural Code of 1923 appears in the Agricultural Code of 1927 as "Article 25", rather than as "Article 23."[25]

It is apparent, therefore, that the Supreme Court in the Cecil case, considered only the provisions of the Agricultural Code of 1923 relating to the sale of farm products on commission,[26] and nothing therein can be deemed to indicate an intention to construe Article 23 of the Agricultural Code of 1927, (relating to suspension from sale of articles seized) or Article 7 of the Agricultural Code of 1927 (relating to the misbranding or adulteration of foods and drugs).

The second fact to which we have alluded above is equally as obvious. Assuming for the sake of argument that the Supreme Court of Alabama, had it been called upon to consider Articles 7 and 23 of the Agricultural Code of 1927, would have given voice to the same views expressed in dealing with Article 23 of the Agricultural Code of 1923 (now Article 25 of the Agricultural Code of 1927), we are unable to perceive that it has limited State action upon matters of this kind. At most, it can be contended only that the Supreme Court of Alabama has held that the State act is not aimed directly at interstate commerce. This we do not deny. In fact, the entire burden of this brief is directed to a similar argument. The act is not intended to regulate interstate

---

[25] See Agricultural Code of Alabama, 1927, pp. 278-288.

[26] Article 25 of the 1927 Agricultural Code.

commerce. If it affects it at all, it does so only incidentally and within a permitted field. This Court has many times determined that while a statute may not, considered in its own nature, operate as a regulation of interstate commerce, the same act may none the less affect commerce incidentally.[27]

The cases of *Stafford vs. Wallace* 258 U. S. 495; *Dahnke-Wallace Milling Co. vs. Bondurant*, 257 U. S. 282; and *Chicago Board of Trade vs. Olsen*, 262 U. S. 1 cited by counsel for petitioner in support of the argument that packing stock butter stored in petitioner's plant and mixed with other butter acquired in Alabama for manufacture into the finished product for sale and shipment, remains in interstate commerce, furnish no support for such a contention. In each of these cases the subjects dealt with were "in the middle of the current of commerce". The stopping point in the states was considered to be merely a "throat through which the current flows". Such is obviously not the case here. Here the journey has ended for the packing stock butter. To paraphrase this Court's statement in *Bacon vs. Illinois*, 227 U. S. 504, at p. 516, "the property (the butter) was held by the petitioner for his own purposes and with full power of disposition".

It is, therefore, earnestly but respectfully submitted that the dissent of Judge Foster and the

---

[27] Cf. Smith vs. Ala., 124 U. S. 465, 482; Minn. Rate Cases 230 U. S. 352; S. C. Highway Dept. vs. Barnwell Bros., 303 U. S. 177.

argument of counsel upon the proposition that the Court of Appeals erroneously failed to follow the Supreme Court of Alabama, fall of their own weight.

## CONCLUSION.

In conclusion, therefore, it is submitted: First, that the statute of Alabama, the operation of which is attacked, is not, considered in its own nature, a regulation of interstate commerce even when applied as in the case under consideration; Secondly, that both the act and the administrative procedure thereunder are properly within the scope of the admitted power reserved to the State of Alabama, and inherent in this state, to protect the health and welfare of its citizens and those of other States who might suffer because of the actions of its citizens; Thirdly, that so far as the statute, and the administrative procedure following it, affect transactions of commerce among the States, they do so only indirectly, incidentally, and remotely, and not so as to burden or impede them; and Finally, in the particulars in which such statute and such procedures under it touch those transactions at all, neither the statute nor the procedure is in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence.

Upon these reasons we base our contention that the petition for Writ of Certiorari should be denied, or, in the alternative, we respectfully suggest that

guard the health of the inhabitants of the State, and to protect those inhabitants from fraud and imposition, are valid when reasonable in their requirements and not in conflict with Federal laws, although they may affect interstate commerce in their relation to articles prepared for export or by including, incidentally, those brought into the State. In *Eichholz v. Public Service Commission of Missouri*, 306 U. S. 268 at page 274, Mr. Chief Justice Hughes observes:

> "But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests *even though interstate commerce is directly affected.*" (Emphasis supplied).

It will not be disputed, we think, that it is within the power of the State to make regulations in the exercise of the police power prohibiting within its borders the manufacture and sale of adulterated food, and that such action does not violate the commerce clause of the Federal Constitution even though its effect is to impose a burden on interstate commerce.[2]

The pertinent provisions of the Agricultural Code of Alabama of 1927 are obviously directed to

---

[2] Clason v. Indiana, 306 U. S. 439; Corn Products Ref. Co. vs. Eddy, 249 U. S. 47; Weigle v. Curtice Bros. Co., 248 U. S. 285; Sligh vs. Kirkwood, 237 U. S. 52; Savage vs. Jones, 225 U. S. 501; Crossman vs. Lurman, 192 U. S. 189; Plumley vs. Massachusetts, 155 U. S. 461; Powell vs. Pennsylvania, 127 U. S. 678.

the end of protecting the health of the inhabitants of the State of Alabama, and apparently the provisions seek to safeguard against the consequence of ignorance and incapacity, as well as fraud.[3] The pertinent sections of the Agricultural Code of Alabama, 1927, are set out in the Appendix at pp. 42-47.

Reference to Section 36 of Article 7 reveals that the purpose of the article is,

> "to prevent the manufacture, possession, sale or delivery of adulterated or misbranded food and drugs, and for other purposes".

In line with this purpose, it is provided by Section 218 that,

> "* * * any article of food or drug which is adulterated * * * and which is * * * delivered within this state * * * shall be liable to be proceeded against in the Circuit Court of the County where the same is found and seized for confiscation by writ of attachment for condemnation".

The term "food" is defined by Section 38 as including

---

[3] Cf. Plumley vs. Massachusetts, supra p. 472, citing Dent vs. West Virginia, 129 U. S. 114, 122.

the judgment of the Circuit Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted,

THOMAS S. LAWSON,
*Attorney General of Alabama*

WILLIAM H. LOEB,
*Assistant Attorney General.*

# APPENDIX

## AGRICULTURAL CODE OF ALABAMA OF 1927

Section 36. **Misbranding and Adulteration of Foods and Drugs.**—The purposes of this Article are to prevent the manufacture, possession, sale or delivery of adulterated or misbranded food and drugs, and for other purposes. The State Board of Agriculture shall have the power and authority, and it shall be its duty: (a) To promulgate all rules and regulations necessary to the accomplishment of the purposes of this Article and make effective its provisions; (b) To fix the standards of purity for all food and drug products which shall be, so far as practical, in accordance with the standards promulgated by the Federal Government through its duty authorized agents.

Section 37. **Possession; Sale and Delivery of Prohibited Articles.**—No person within this State shall manufacture for sale therein, have in possession with intent to sell, offer or expose for sale, sell, or deliver any article of food or drugs which is adulterated or misbranded within the meaning of this Article.

Section 38. **Definition of Words and Terms.**—The word "article" when referring to food or drugs, is used in the broad and comprehensive sense and has reference to the food product or the drug product in question. The term "food" as used herein shall include all articles of food, drink, confectionery, or condiment, whether simple, mixed or compound, used or intended for use by man or domestic animals. The term "drug" as used herein shall include all medicines and preparations recognized in the U. S. Pharmacopoeia or National Formulary for internal or external use and any substance or mixture of substances to be used for the cure, mitigation or preventation of disease in man or domestic animals. The words

"standard of purity or quality" herein used shall refer to and include the standards of purity for food products promulgated by the State Board of Agriculture and statutes of this State.

Section 39. **Adulteration of Food.**—An article shall be deemed adulterated in the case of food. First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength. Second. If any substance has been substituted wholly or in part for the article. Third. If any valuable constituent of the article has been wholly or in part abstracted. Fourth. If it be mixed, colored, powdered, coated, stained, or otherwise treated in a manner whereby damage or inferiority is concealed, or in a manner whereby the appearance of said Article is improved; provided this shall not apply to the precoloring or processing of fruits where such precoloring or processing does not conceal damage or inferiority. Fifth. If it contains any poisonous or deleterious ingredient which may render such article injurious to health; Provided, that when in the preparation of food products for shipment they are preserved by an external application applied in such a manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering of the package, the provisions of this Article shall be construed as applying only when said products are ready for consumption. Sixth. If it consist in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter. Seventh. If in the course of its preparation of manufacture an ingredient of inferior food value has been substituted in whole or in part for an ingredient of greater food value. Eighth. If it does not conform to the standard of purity or quality established for the article.

Section 217. As Amended by General Acts 1935 pp. 1102, 1103. **Section 217. Suspension of Sale of Article.**—If at any time the Commissioner or his duly authorized agent, shall have reason to believe that any product or products or article mentioned in the succeeding sections of this Article, which are held in possession, delivered, kept, offered or exposed for sale in this State, do not comply with the requirements of this Article or other Article of this Code as to ingredients, substance, analysis, marking or labelling, weight or measure of the same, it shall be his duty by written order to suspend the sale of the same until he shall have satisfied himself, or shall be satisfied by an analysis, or otherwise, that such product or article is made up, compounded or marked as required by law and rules and regulations under authority of law. If he shall find that the same does not comply with such laws and rules and regulations, either before or after the making of such suspension order, then he is authorized to proceed with regard to the same as provided in the succeeding Sections of this Article, or he may order in writing the same to be held at his disposition pending the placing of such product or article in such condition as will meet the requirements of such laws, rules and regulation, under the supervision and direction of the Commissioner or his duly authorized agent, or at the discretion of the Commissioner proceeding with regards to the same as provided in the suceeding Sections of this Article. Provided in case the owner of such product or article denies by written notice to the Commissioner or his agent that the same is not in compliance with the laws, rules or regulations and requests a hearing thereon, the Commissioner or his agent shall as soon as practicable thereafter proceed as provided in the succeeding Sections of this Article, in order that the Court may hear and decide said issue and proceed as provided for in the succeeding Sections of this Article. Any person who moves, transports,

sells or in any other manner disposes of any product or article after such product has been ordered suspended or held as hereinbefore provided shall be guilty of a misdemeanor and upon conviction thereof fined not more than Five Hundred ($500.00) Dollars or imprisoned for not more than six months or both, provided that such product or article may be moved, transported or otherwise disposed of by and in compliance with written order by the Commissioner.

Section 218. **Proceeding to Condemn Seized Article.** —Any fertilizer, fertilizer material, ground limestone, paint, white lead; linseed oil, turpentine, kerosene or other illuminating oils, gasoline, benzine or other liquid motor fuels, insecticides and fungicides, commercail feeds, agricultural seeds, eggs, vinegar, sausage, milk, cream, ice cream or other dairy products, imitation butter and cheese, or any article of food or drug which is adulterated misbranded or under standard, grade, weight or measure claimed within the meaning of any provision of this Code, and which is manufactured for sale, held in possession with intent to sell, offered or exposed for sale, or sold or delivered within this State, shall be liable to be proceeded against in the Circuit Court of the County whree the same is found and seized for confiscation by writ of attachment for condemnation. Such writ shall issue upon the swron complaint of the Commissioner or his duly authorized agent, taken by an officer authorized to administer an oath to the effect that such articles or product is adulterated or misbranded or is under standard, grade, weight or measure claimed, as the case may be within the meaning of this Article. The said sworn complaint by said Commissioner or his duly authorized agent, may be amended at any stage of the proceedings. Said writ shall be returnable in five days to the Court issuing the writ; such Court shall hear and decide whether the allegations of the complaint are true and whether said article or product shall be condemned and confiscated. Such

hearing shall not be had until five days' notice of the date therefor shall have been served on the owner, his agent, or any other party having an interest in the same, except in case defined in subhead (a). Service of a copy of the writ of attachment showing the returns of the attaching officer shall be sufficient notice for the purposes of this Section. Such writ may be executed by the Commissioner, his duly authorized agent, or by any sheriff or constable in the State. Upon the seizure of the article or product described in the affidavit, it shall be the duty of the officer or person executing the writ to return same to the Circuit Court, with his return thereon, and within five days after its return, the Court shall make up an issue between the State as Plaintiff and the property seized as defendant. (a) In the event that the owner or his agent cannot be found in this State, then said service may be perfected by posting a copy of the writ in a conspicuous place upon the premises where the goods were found and seized, and by mailing a copy thereof by registered mail to the owner, or his agent, to his last known address, and this shall be deemed to be sufficient service of the notice required by this Section. If upon the return day of such writ of attachment, the owner of the article or product, his agent or other party having an interest in same thus notified fails to appear and show cause why said goods should not be condemned, judgment of condemnation and confiscation shall, upon such default, be rendreed by the Court on the basis of said complaint. If such owner or agent or other party having an interest in such article or product shall on or before the return day of the writ of attachment, or upon such other day as the Court upon application of such party may determine, shall file an answer upon oath denying the allegations of adulteration, misbranding, or under standard, grade, weight or measure, as the case may be, in said complaint, the issue thus raised may be determined by the Court after hearing all the evidence offered by or in behalf of all the parties to the proceedings. Any such party may

demand a jury trial of any issue of fact to be determined in the proceedings instituted hereunder, and in case a jury trial is demanded, the judgment rendered by the Court shall be in accordance with the facts as found by such jury; provided, however, that the verdict of the jury may be set aside by the Court where manifestly contrary to the evidence of law. If a judgment of condemnation and confiscation is rendered against such article or product as being adulterated, misbranded, or under standard, grade, weight or measure, within the meaning of this Article, the same shall be disposed of by destruction or sale, as the Court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Agricultural Fund, but such goods shall not be sold contrary to the provisions of this Article; provided, however, that upon the payment of the costs of such attachment proceedings and the execution and delivery of a good and sufficient bond to the effect that such article shall not be sold or otherwise disposed of contrary to the provisions of this article, the Court may be ordered direct that such article or product shall be delivered to the owner thereof.

## REMARKS OF SENATOR SPOONER—APRIL 3, 1902—CONGRESSIONAL RECORD, FIFTY-SEVENTH CONGRESS—VOLUME 35, PART 4, PAGE 3604

"In the Plumley case the statute of Massachusetts prohibited the sale, not of oleomargarine which disclosed its own nature, not of oleomargarine which could be identified as such—that was excepted—but of oleomargarine, or the custody of it for sale, wherever it came from, if manufactured in imitation of yellow butter produced from pure unadulterated milk or cream. The court held that the act of Massachusetts was a valid act. Later the Pennsylvania statute, which prohibited the possession for sale of oleomargarine, colored or uncolored, came before the Supreme Court of the United States. The oleomargarine

had been brought in, I think, from the State of Rhode Island. What did the court hold about it? The court held that a statute which attempted to prevent the transportation of oleomargarine from State to State in any form was beyond the power of the State. Why? Because they took judicial notice of the fact that oleomargarine was a healthful product, and they stid no State can be permitted, in the exercise of its police power, to say that a healthful product shall not enter into commerce between the States.

That was a necessary decision; nobody could question it, because, as I said the other day, if the States were permitted to say what should or should not be transported from State to State the regulatory power of Congress over interstate commerce would be gone. Did that decision conflict in any way with the decision in the Plumley case? Not at all. The court held that while a State could not prevent, in the exercise of its police power, the transportation from another state into its boundaries of oleomargarine in its natural color so that it could be identified for what it was, where it was colored in the similitude of butter a State had the power, as protecting the consumers from fraud, to prevent its sale within that State, even though it came from another State. So that in this very case, as to this very product, the Supreme Court of the United States, by these two decisions—and in the Schollenberger case, in order to emphasize the distinction, they italicize the words "manufactured in imitation of yellow butter"; etc.—decided that one, the article sold for what it is, is a legitimate article of commerce; that no State can prevent its transportation from another State into its boundaries, or is sale after transportation, because the police power of the State cannot be used in order to destroy interstate commerce in a healthful article.

On the other hand, they held that where the same article is colored to cheat the eye as well as the sense

of smell and taste, to be an easy imposition upon those who want butter, it is in the power—it not being a legitimate article of interstate commerce—of the State, exercising its police jurisdiction, to arrest it and absolutely prohibit it. And so upon that alternative basis, dealing first with the product that is a genuine product, and alternatively with it as a fraud, Mr. President, as Mr. Justice Harlan says it is; and he says it is colored to be a fraud, and I believe it to be—dealing with it in the alternative way, this bill says, substantially, "If you manufacture it so that those who buy it will know what they are buying, a tax of one-quarter of one cent a pound is put upon it. If you choose to attempt to evade this tax by making a counterfeit of it, so that it resembles an article which is not taxed by law, and therefore may be sold simply because of its color, without paying the one-fourth of one cent a pound, or if you color it—for it comes to that also—so as to be able to perpetrate a fraud upon the consumers, you shall pay ten cents a pound upon it."

If there is anything unconstitutional about that, Mr. President, I do not see it. I repeat today what I said the other day, that a business which comes before Congress with the statement that its life depends upon being permitted to violate the laws of 32 States with comparative imunity, and to unrestrainedly put upon the market an article which looks and tastes and smells like something which it is not, is not much entitled to consideration.

Does the bill interfere or invade in any way the rights of the States????? Of course, a State must not be permitted to say what article subject to Federal taxation can be taxed in a State. Does this invade in any way the sovereignty of a State? Does it do so any more than in the case of the Federal liquor tax? The Congress taxes liquor made in Wisconsin. The State of Wisconsin has the power, the Supreme Court say, to prohibit its manufacture within its boundaries. Of course, in that event

there would be no tax to be collected from it. So as to oleomargarine. The States, under this law, may prohibit its manufacture colored in the similitude of butter; but if they permit its manufacture colored in the similitude of butter they cannot exempt it from the tax imposed by Congress.

The provision in the House bill which the committee have struck out, was intended—I will not say by the man who introduced it, for I do not know who introduced it—to interject into this bill, if it should become a law, a constitutional question upon the basis that it left the States free to authorize or permit its manufacture and sale without tax when colored in the similitude of butter. Of course, if that were its object—and I have some very strong evidence that it was so regarded by those who are fighting this bill—the whole tax here would become invalid the moment a State exercised that power and permitted oleomargarine to be manufactured exempt from the tax imposed by Congress, for the rule of uniformity would thereby be broken; and evidently Congress cannot levy a tax and permit any State to make that State an exception to its operation.

I want further to say, Mr. President, that **this bill does not in any way shackle a State. It is a concession to the States, as has been generally understood, because up to this time, I believe, it has been generally regarded, that the original package doctrine has been held to be applicable to this product when it is imported into the States, and that the States have no power, therefore, to regulate it or to interfere with it until the original package is broken. I am not at all certain that that is good law, but it has been so regarded. But under the provisions of this bill that cannot be again contended, because, whether necessarily or unnecessarily, this bill applies to oleomargarine the provisions similar to the Wilson law.**

I do not know how Senators propose to get away from these two decisions of the Supreme Court of the United States, differentiating from the standpoint of legitimacy and fraud the uncolored oleomargarine and the butter-colored oleomargarine, holding that one, the genuine article, no State can exclude; holding that the other, the illegitimate article, because easily put upon the market for butter, a State has the power to exclude altogether as a fraud."

## FORM USED IN SEIZURE IN THIS CASE

AFFIDAVIT FOR WRIT OF ATTACHMENT FOR CONDEMNATION:

(as provided in Section 218, of the Agricultural Code of Alabama of 1927)

STATE OF ALABAMA

COUNTY OF JEFFERSON

Before me Richard V. Evans, (CIRCUIT JUDGE) of the county of Jefferson, in Alabama, personally appeared E. F. Cottier, who being duly sworn, deposes and says, (1) that he is a duly authorized agent of the Commissioner of Agriculture and Industries of this State, (2) that there is located on the premises of Birmingham Ice and Cold Storage Co., Birmingham, Ala., certain packing stock butter described as follows, to wit:

10-55 gallon steel drums containing 3,991 pounds of packing stock butter represented by sample Nos. 61 C-K thru 70 C-K incl.

(To credit of Cloverleaf Butter Co., Birmingham, Ala.)

which, affiant, E. F. Cottier has probable cause to believe, and does believe, is manufactured for sale, or held

in possession with intent to sell, or offered, or exposed for sale, or sold, or delivered within this State, and on the 21 day of June, 1939 was held in possession by a person within the State of Alabama who manufactures, sells, keeps for sale, offers or exposes for sale, serves, distributes or delivers the same; and which, affiant, E. F. Cottier, has probable cause to believe, and does believe, is adulterated within the meaning of the provisions of the Agricultural Code of 1927, and amendments thereto, in the following particular to wit:

> said butter is adulterated in that it consists in whole or in part of a filthy animal substance, namely, butter which contains maggots, flies, fly fragments, rodent hairs and other extraneous matter

contrary to law and against the peace and dignity of the State of Alabama; and (3) that such butter should be seized and forfeited to the State.

E. F. Cottier

Name of Party making Affidavit

Sworn to and subscribed before me this the 21 day of August 1940

Richard V. Evans, Circuit Judge

Name and Style of Officer taking Addidavit

FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 5 1941
CHARLES ELMORE CROPLEY
CLERK

# In The
# Supreme Court of the United States

**OCTOBER TERM, 1941**

NO. 28

CLOVERLEAF BUTTER COMPANY,
A CORPORATION,
*Petitioner,*

*vs.*

HAYGOOD PATERSON as Commissioner of Agriculture & Industries of the State of Alabama, et. al.,
*Respondents.*

## BRIEF FOR RESPONDENTS

THOMAS S. LAWSON,
*Attorney General of Alabama*

WILLIAM H. LOEB,
*Assistant Attorney General*

*Counsel for Respondents.*

# INDEX

## SUBJECT INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 2 |
| Statement of the case | 2 |
| Questions for decision | 5 |
| Argument | 7 |
| I. The decision of the Court of Appeals in this cause is in accord with the applicable decisions of this Court | 7 |
| A. The protection and promotion of the health of its citizens is an inherent power of the State of Alabama, and so long as the exercise of this power does not conflict with the Constitution or statutes of the Central Government, the State of Alabama may act without limitation, even though its action may directly affect interstate commerce | 7 |
| B. Congress has not exclusively occupied the field by the Renovated Butter Act, nor has it, by such Act, regulated interstate commerce so completely as to prohibit state action | 12 |
| 1. The Renovated Butter Act is not intended as a regulation of commerce. It is a revenue measure. Its object and scope has long since been delineated by this Court | 12 |

Page

2. Assuming that the Renovated Butter Act was intended as a regulation of commerce, Congress has specifically indicated its will that renovated or process butter may be subjected to restrictions by the State even though interstate commerce be affected ..... 19

3. Assuming that the Renovated Butter Act is a "regulation of commerce" and that Congress has not specifically indicated its will to allow state restrictions, nevertheless the Act does not operate to render inoperative the State's right of action in cases of this kind ..... 28

C. The decisions of this Court establish the doctrine that state officers enforcing by seizure police regulations with regard to foods will not be enjoined merely because there exist similar Federal laws and regulations in respect to the same subject matter and there has been no Federal seizure ..... 36

Page

II. The Circuit Court of Appeals did not erroneously fail to follow the construction placed on the Agricultural Code by the Supreme Court of Alabama in State vs. Cecil, 216 Ala. 391 ..... 47

Conclusion ..... 50

Page

TABLE OF CASES CITED.

Adams Express Co. v. Croninger, 226 U. S. 491 ..... 37, 41

Asbell vs. Kansas, 209 U. S. 251 ..... 44

Austin vs. Tennessee, 179 U. S. 343, 363 ..... 22

Bacon vs. Illinois, 227 U. S. 504, at p. 516 ..... 50

Brown vs. Houston, 114 U. S. 622 ..... 40

California vs. Thompson, 85 L. ed. 793, 796 ..... 9

Carey vs. South Dakota, 250 U. S. 118 ..... 9, 44, 45

Charleston & W. C. R.R. Co. v. Varnville Furniture Co., 237 U. S. 597 ..... 37

Chicago Board of Trade vs. Olsen, 262 U. S. 1 ..... 49

Clarke Distilling Company vs. Western Maryland Ry. 242 U. S. 311 ..... 24, 27

Clason v. Indiana, 306 U. S. 439 ..... 9

Cloverleaf Butter Co. v. Paterson, 116 Fed. 2d. 227 ..... 1

Corn Products Ref. Co. vs. Eddy, 249 U. S. 427 ..... 9, 44

C. R. I. & P. Co. v. Hardwick Co., 226 U. S. 426 ..... 37, 41

Crossman vs. Lurman, 192 U. S. 189 ..... 9, 44

Currin vs. Wallace, 306 U. S. 1 ..... 38

Page

Dahnke-Wallace Milling Co. vs. Bondurant, 257 U. S. 282 ..... 49

Dent vs. West Virginia, 129 U. S. 114, 122 ..... 9

Eichholz v. Public Service Commission of Missouri, 306 U. S. 268 ..... 8, 42

Erie R. R. v. New York, 233 U. S. 671 ..... 37

Erie R. R. Co. v. Winfield, 244 U. S. 170 ..... 37

Federal Trade Commission v. Bunte Bros. Inc., No. 85, decided February 17, 1941 ..... 28

Gilman vs. Philadelphia, 3 Wall. 713 ..... 40

Hartford Accident etc. Co. v. Ill. 298 U. S. 156 ..... 26, 45

Hebe Co. vs. Shaw, 248 U. S. 297 ..... 44

Hines v. Davidowitz No. 22, 85 L. ed. 366, 372 ..... 12, 37, 40, 45, 48

Hygrade Provisions Co. vs. Sherman, 266 U. S. 407, 505 ..... 9

In Re Kollock, 165 U. S. 526, 533 ..... 13, 14, 15

In Re Rahrer, 140 U. S. 545 ..... 24, 26

Kelly vs. Washington, 302 U. S. 1 at p. 14 ..... 11, 16, 38, 44

Leisy vs. Hardin, 135 U. S. 100 ..... 40

L. & N. R. R. Co. v. State, 16 Ala. App. 199 ..... 37

Magnano Co. vs. Hamilton, 292 U. S 40, 47 ..... 16

Page

Maurer vs. Hamilton, 309 U. S. 598 ..... 42, 44

McCray vs. U. S., 195 U. S. 27, 59 ..... 13, 14

Merchants Exchange vs. Missouri, 248 U. S. 365 .. 44

Minnesota Rate Cases, 230 U. S. 352, 398-412 .... 7, 49

Mintz vs. Baldwin 289 U. S. 346 ..... 38, 39

Missouri P. R. Co. vs. Norwood, 283 U. S. 249, 257 ..... 44

Missouri-Pacific R. R. v. Stroud, 267 U. S. 404 .... 37

Missouri Pacific vs. Porter, 273 U. S. 341 ..... 37, 41

Napier v. Atl. Coast Line R. R. Co., 272 U. S. 606 ..... 37, 39

Nelson vs. Sears Roebuck & Co., 85 L. ed. 525 ..... 38

New York Central R. R. v. Winfield, 244 U. S. 147 ..... 37

Nigro v. U. S., 276 U. S. 332 ..... 13

Northern Pacific R. R. v. Wash., 222 U. S. 370 .... 37

Oregon-Wash. R.R. Co. v. Wash., 270 U S. 87 ..... 37, 42, 46

Pacific States Co. vs. White, 296 U. S. 176, 181, 182 ..... 10, 38, 44

Plumley vs. Massachusetts, 155 U. S. 461 ..... 9, 13, 21, 44

Polk Co. vs. Glover, 305 U. S. 5, 11, 15 ..... 10

## INDEX—Continued


| | Page |
|---|---|
| Powell vs. Pennsylvania, 127 U. S. 678 | 9, 44 |
| Prigg vs. Pennsylvania, 16 Peters 539 | 43 |
| Reid vs. Colorado, 187 U. S. 137 | 44 |
| Robbins vs. Shelby County Taxing Dist., 120 U. S. 489 | 40 |
| Savage vs. Jones, 225 U. S. 501 | 9, 22, 44 |
| Schollenberger vs. Pennsylvania, 171 U. S. 1, 28 | 22 |
| Skiriotes vs. Fla., 85 L. ed. 825, 829 | 9 |
| Sligh vs. Kirkwood, 237 U. S. 52 | 9, 44 |
| Smith vs. Alabama, 124 U. S. 465, 482 | 49 |
| Sonzinsky v. U. S., 300 U. S. 506, 513 | 13 |
| South Carolina Highway Department vs. Barnwell Bros., 303 U. S. 177, 184, 188-191 | 7, 38, 44, 49 |
| Southern R. R. v. Reid, 222 U. S. 424 | 37 |
| Stafford vs. Wallace, 258 U. S. 495 | 49 |
| State vs. Cecil, 216 Ala. 391 | 47 |
| Townsend vs. Yoeman, 301 U. S. 441, 454 | 38, 44 |
| United Dairy Co. vs. U. S., 250 Fed. 231 | 10 |
| United States vs. Bohl, 125 Fed. 625 | 13 |
| U. S. vs. 52 Drums, etc., 110 Fed. (2d) 914 | 10 |
| U. S. v. 11,150 Pounds of Butter, 195 Fed. 657 | 34 |

Page

U. S. vs. Nine Barrels of Butter, 241 Fed. 499, 500 ..... 10

Weigle vs. Curtice Bros. Co., 248 U. S. 285 ..... 9

Welch Co. vs. New Hampshire, 306 U. S. 72 ..... 42, 44

Whipple vs. Martinson, 256 U. S. 41 ..... 16

STATUTES CITED.

Alabama Agricultural Code, Secs. 36, 37, 38, 39 ..... 9, 10

Alabama Agricultural Code, Sec. 217 ..... 2

Alabama Agricultural Code, Sec. 218 ..... 3

Alabama Code 1940, Title 2, No. 314 ..... 48

General Acts of Alabama, 1923, page 463 ..... 47

Internal Revenue Code, Sec. 3243 ..... 20

Internal Revenue Code, Sec. 3276 ..... 20

Oleomargarine Act of 1886 ..... 13

Renovated Butter Act (Sec. 5, 1902 Act) ..... 31

Wilson Act ..... 23

LAW REVIEW ARTICLES

41 Harv. L. Rev. 200; 37 Col. L. Rev. 43; 34 Col. L. Rev. 43; 34 Col. L. Rev. 995, 1027 1038; 86 Penn. L. Rev. 532; 12 Minn. L. Rev. 607 ..... 39

# In The
# Supreme Court of the United States

**OCTOBER TERM, 1941**

---

NO. 28

---

CLOVERLEAF BUTTER COMPANY,
A CORPORATION,

*Petitioner,*

*vs.*

HAYGOOD PATERSON as Commissioner of Agriculture & Industries of the State of Alabama, et. al.,

*Respondents.*

---

## BRIEF FOR RESPONDENTS

---

### I.

### OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit, which petitioner is asking this Court to review, is reported in 116 F. (2d) 227.

## II.

### JURISDICTION.

Petitioner seeks to invoke the jurisdiction of this court to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit rendered on the fourteenth day of January, 1941. Petitioner relies upon Section 240 of the Judicial Code as amended by Acts of February 13, 1925, Subsections (a) and (b), separately and severally (U.S.C.A., Title 28, Sec. 347), and also Rule 38 of the Revised Rules of the Supreme Court of the United States, adopted February 13, 1939.

## III.

### STATEMENT OF CASE.

The Department of Agriculture and Industries of the State of Alabama acting through its Division of Agricultural Chemistry during the period from April, 1939 to June, 1940, seized certain country or packing stock butter belonging to petitioner, which butter allegedly was to be used in processing or renovating butter in Alabama for sale there and in other states. Some of the butter seized was bought in Alabama, while some of it was brought to petitioner's plant from other states. The seizures were made in every instance under authority of, in conformity to and completely within Section 217, Agricultural Code of Alabama of 1927 as amended by General Acts, 1935, Section 3, pp. 1103 and 1104,

and Section 218 of said Agricultural Code of 1927 (Appendix pp. 54, 56). See Affidavit for Writ of Attachment for Condemnation, copy of which appears in Appendix, p. 60.) The seizures were made in each instance on the theory that such country or packing stock butter was an adulterated food within the meaning of Sections 37, 38, and 39 of the Agricultural Code of Alabama of 1927 (Appendix pages 52, 53) in that it consisted "in whole or in part of a filthy, decomposed or putrid vegetable or animal substance or any portion of an animal unfit for food, whether manufactured or not * * * ."

On June 28, 1940, there was filed in the United States District Court, Southern Division of the Middle District of Alabama, a complaint seeking a temporary and permanent injunction against the Commissioner of Agriculture and Industries of the State of Alabama and the Director of the Division of Agricultural Chemistry in the Department of Agriculture and Industries of the State of Alabama, to restrain them from inspecting petitioner's plant, or inspecting or seizing packing stock butter at such plant. (R. 1). On the same day, June 28, 1940, the Honorable C. B. Kennamer, Judge of said District Court, entered an order setting the application for preliminary injunction for hearing on the twelfth day of July, 1940, (R. 20).

On July 12, 1940, respondents filed a motion to dismiss the complaint, (R. 34). This motion to dismiss was first overruled by the District Court, (R.

35). Thereupon the respondents filed an answer and the petitioner moved to strike from the answer filed certain language set out in the said motion. The Court overruled the motion to strike (See reference in third paragraph of the decree, R. 35), and set Thursday, July 25, 1940 as the time and place for further hearing.

Prior to the date fixed for the further hearing, counsel for the parties agreed to limit the issues to be submitted to the Court by stipulation, in lieu of taking testimony, and to resubmit the cause to the Court on the complaint and the stipulation limiting the issues and the motion to dismiss. Pursuant thereto, the parties entered into such stipulation (R. 36, 37) and, on the same date, (July 23, 1940) resubmitted the cause to the Court on the complaint and stipulation and the motion to dismiss. On this submission, the Court entered the decree dismissing the bill, (R. 37). Petition for appeal to the United States Circuit Court of Appeals for the Fifth Circuit was duly filed (R. 39) and allowed on July 23, 1940, (R. 37).

Upon consideration of the matters and things presented on the appeal, the United States Circuit Court of Appeals for the Fifth District affirmed the judgment of the District Court of the United States for the Middle District of Alabama (R. 52), Circuit Judge Hutcheson issuing the opinion (R. 42) with Foster, J. dissenting.

Petitioner's application for rehearing, filed on January 4, 1941, was duly denied by the Circuit Court of Appeals on January 14, 1941 (R. 53), whereupon petitioner applied to this Honorable Court for writ of certiorari, which was granted by order filed April 7, 1941 (R. 55).

## IV.

### QUESTIONS FOR DECISION.

The questions of law at issue were stipulated below to be the following:

1. Has Congress, by the enactments relating to renovated or process butter, pre-empted the field of inspection and regulation of the raw material, in interstate commerce, out of which such renovated or process butter is manufactured by the plaintiff as alleged in the bill, to the exclusion of the power of the State, its officers or agents to inspect and regulate the quality of such raw material?

2. Does the inspection of packing stock butter, in interstate commerce, used by the plaintiff in the manufacture of process or renovated butter as alleged in the bill of complaint, made or directed to be made by the Secretary of Agriculture of the United States, pursuant to the Federal laws and regulations relating to renovated or process butter, have the effect in connection with said Federal laws of excluding the State of Alabama, its officers and

agents, from inspecting or seizing or suspending the packing stock butter, in interstate commerce out of which renovated butter to be sold in interstate commerce as alleged in the complaint is manufactured by the plaintiff as alleged in the complaint?

3. Under the Federal statutes, is the Secretary of Agriculture of the United States the sole judge, to the exclusion of State officers and agents, of the fitness and suitability of packing stock butter, in interstate commerce as alleged in the bill, for use by the plaintiff as raw material in the manufacture of renovated or process butter for sale in interstate commerce as alleged in the bill?

4. It is further stipulated and agreed that there is no conflict in the standards of the State of Alabama and the Federal Government, relating to the fitness or suitability of packing stock butter in interstate commerce to be used as raw material in the manufacture of renovated or process butter, and that this case be confined to the legal questions set out in paragraphs 1, 2, and 3, above.

5. It is agreed that the phrase "in interstate commerce" as used in this stipulation, shall be construed to mean "procured, transported, handled, or sold as alleged in the complaint", as the context may indicate. (R. 36).

## ARGUMENT.

### I

### THE DECISION OF THE COURT OF APPEALS IN THIS CAUSE IS IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT.

#### A.

**The Protection and Promotion of the Health of its Citizens is an inherent Power of the State of Alabama, and so long as the exercise of this power does not conflict with the Constitution or Statutes of the Central Government, the State of Alabama may act without limitation, even though its action may directly affect Interstate Commerce.**

The general principles covering the exercise of State authority when interstate commerce is affected, have been repeatedly stated by this Court. Many cases are collected in the opinions in the *Minnesota Rate Cases*, 230 U. S. 352, 398-412, and *South Carolina Highway Department vs. Barnwell Bros.*, 303 U. S. 177, 184, 188-191.[1]

From the authorities collated in these decisions, it is apparent that State statutes designed to safeguard the health of the inhabitants of the State, and to protect those inhabitants from fraud and imposi-

---

[1]While other cases might be cited, we deem it inadvisable to unnecessarily burden this brief with them, since these two cases deal at length with most of the pertinent ones.

tion, and proceedings by state officials under such statutes and directed to the same end, are valid when reasonable in their requirements and not in conflict with Federal laws, although they may affect interstate commerce in their relation to articles prepared for export or by including, incidentally, those brought into the State. In *Eichholz v. Public Service Commission of Missouri*, 306 U. S. 268 at page 274, Mr. Chief Justice Hughes observed:

> "But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests *even though interstate commerce is directly affected.*" (Emphasis supplied)

Here it appears from the complaint that at least ten per cent of the butter produced from this packing stock butter is sold to citizens of the State of Alabama.

It will not be disputed, we think, that it is within the power of the State to make regulations in the exercise of the police power prohibiting within its borders the manufacture and sale of adulterated food, where part of that food will be sold to its citizens, and that such action does not violate the commerce clause of the Federal Constitution even though

its effect is to impose a burden on interstate commerce.[2]

The pertinent provisions of the Agricultural Code of Alabama of 1927 are obviously directed to the end of protecting the health of the inhabitants of the State of Alabama, and apparently the provisions seek to safeguard against the consequence of ignorance and incapacity, as well as fraud.[3] The pertinent sections of the Agricultural Code of Alabama, 1927, are set out in the Appendix at pp. 52-59.

Reference to Section 36 of Article 7 reveals that the purpose of the article is,

> "to prevent the manufacture, possession, sale or delivery of adulterated or misbranded food and drugs, and for other purposes".

In line with this purpose, it is provided by Section 218 that,

> "*** any article of food or drug which is adulterated *** and which is *** delivered within this state *** shall be liable to be proceeded against in the Circuit Court of the County where the same is found and seized for confiscation by writ of attachment for condemnation".

---

[2] *Clason v. Indiana*, 306 U. S. 439; *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 505; *Carey v. South Dakota*, 250 U. S. 118; *Corn Products Ref. Co. v. Eddy*, 249 U. S. 427; *Weigle v. Curtice Bros. Co.*, 238 U. S. 285; *Sligh v. Kirkwood*, 237 U. S. 52; *Savage v. Jones*, 225 U. S. 501; *Crossman v. Lurman*, 192 U. S. 189; *Plumley v. Massachusetts*, 155 U S. 461; *Powell v. Pennsylvania*, 127 U. S. 678. See also: *Skiriotes v. Fla.*, No. 658, decided April 28, 1941, 85 L. ed. 825, 829; *California v. Thompson*, No. 687, decided April 28, 1941, 85 L. ed. 793, 796.

[3] Cf. *Plumley vs. Massachusetts*, supra p. 472, citing *Dent vs. West Virginia*, 129 U. S. 114, 122.

The term "food" is defined by Section 38 as including

> "all articles of food, drink, confectionery, or condiment, whether simple, mixed, or compound, used or intended for use by man or domestic animals."

In Section 39 it is stated that an article shall be deemed adulterated in the case of food,

> "if it consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance or any portion of an animal unfit for food, whether manufactured or not *** ".

These regulations, it is submitted, were imposed by the Legislature of Alabama in accordance with its constitutional right to determine the policy which it believed would protect the health of the people of the State of Alabama and safeguard them from fraud and imposition.[6]

---

[5]NOTE that in *U. S. vs. Nine Barrels of Butter*, 241 Fed. 499, 500, District Judge Learned Hand writing to the question of whether packing stock butter should be considered as "food" stated:

> "Doubts may arise, where goods are shipped in interstate commerce, which may or may not be articles of food, as their ultimate destination may determine; but this case does not raise them. By no chance can this butter be called anything but an article of food; by no chance can I avoid the conclusion that it was filthy and decomposed in part. As such it came within the terms of the statute, even though it might be saved and reclaimed by being made clean and palatable."

In *Union Dairy Co. v. U. S.*, 250 Fed. 231, and in *U. S. v. 52 Drums of Maple Syrup*, 110 Fed. (2d) 914, 915, it is held that the fact that the foods therein considered (milk and maple syrup respectively) were to be further processed before sale, made them none the less "foods" and constituted no defense to seizure and confiscation if they were adulterated.

[6]Cf. *Pacific States Co. vs. White*, 296 U. S. 176, 181, 182. Also, compare logic of Mr. Justice Black in the dissent in *Polk Co. vs. Glover*, 305 U. S. 5, 11, 15.

It can be concluded, therefore, that these provisions being enacted under the police power of the State, may be effective to authorize the inspection and regulation of petitioner's packing stock butter delivered in the State of Alabama, even though they may incidentally affect interstate commerce.*

This conclusion is based, of course, upon the assumption of an absence of Federal legislation precluding such regulation by the State. Whether the act which petitioner styles the Renovated Butter Act of 1902 preempts state action as is contended for by petitioner is therefore to be considered.

---

*Petitioner's argument that the State officials in inspecting petitioner's plant and seizing the packing stock butter are exceeding the State standard is palpably specious and obviously untenable. It is not shown or contended that the State has adopted standards particularly applicable to packing stock butter. Indeed, no other standards need be adopted than those provided by the statute for all foods, for as already shown, packing stock butter most certainly is a "food". Since the State has adopted no particular standards for packing stock butter, it cannot be argued that the State officials "have gone and will continue to go beyond any State standard for packing stock butter". (See Argument, petitioner's brief, pp. 22, 43, 49 and 70.)

The State officials have treated the packing stock butter as a food and have proceeded against it as such only as authorized by the statute. So actually petitioner's argument can only come to this: That the State officials, in inspecting and seizing the packing stock butter, acted pursuant to and within the State statute, but that their action in so doing was unauthorized for the reason that the Federal government has entered the field to their exclusion. Thus was the question presented to and considered by the District Court and the Circuit Court of Appeals (R. p. 46) and thus shall we consider it here.

* * * *

Apposite to the implication from the facts which astute counsel for petitioner detail on page 5 of Brief for Petitioner, and in refutation of it, is the following from this Court's opinion in *Kelly vs. Washington*, 302 U. S. 1, at p. 14:

> "Much is made of the fact that the state law remained unenforced for a long period. But it did not become inoperative for that reason. Where the state police power exists, it is not lost by non-exercise but remains to be exerted as local exigencies may demand."

B.

**Congress has not exclusively occupied the field by the Renovated Butter Act, nor has it, by such Act, regulated Interstate Commerce so completely as to prohibit State action.**

"The nature of the power exerted by Congress, the object sought to be obtained, and the character of the obligations imposed by the law, are all important in considering the question of whether supreme Federal requirements preclude enforcement of State laws on the same subject." *Hines v. Davidowitz*, No. 22, decided January 20, 1941, 85 L. ed. 366, 374.

1.

*The Renovated Butter Act is not intended as a regulation of commerce. It is a revenue measure. Its object and scope has long since been delineated by this Court.*

It is earnestly contended by petitioner that Congress, by the enactment of the so-called Renovated Butter Act of 1902, has preempted the field of inspection and regulation of country or packing stock butter going into the manufacture of process or renovated butter, which will in turn be sold partially within the State and partially in interstate commerce. Counsel for petitioner, on p. 27 of their brief, state:

"All the sections and all the regulations promulgated under the statute look to complete control of raw material in interstate commerce by the Secretary of Agriculture of the United States."

We earnestly submit, however, that the conclusion of counsel is specious, in that it erroneously assumes that the basic purpose of the Renovated Butter Act and the regulations promulgated pursuant thereto is to regulate commerce.*

We take it to be well established that the power exerted by Congress in the enactment of this statute is the power to raise revenue. The primary object sought to be obtained is to secure revenue.

---

*Note that in *Plumley v. Massachusetts*, 155 U. S. 461, 466, it is stated

"Nor was the Act of Congress (the Oleomargarine Act of 1886 in 24 Stat., 209, the parent of the act here considered) relating to oleomargarine intended as a regulation of commerce among the States. Its provisions do not have special application to the transfer of oleomargerine from one State of the Union to another. They relieve the manufacturer or seller, if he conforms to the regulations prescribed by Congress or by the Commissioner of Internal Revenue under the authority conferred upon him in that regard, from penalty or punishment so far as the general government is concerned, but they do not interfer with the exercise by the States of any authority they possess of preventing deception or fraud in the sales of property within their respective limits."

*Counsel rely heavily on the dictum from the opinion of District Judge Platt in the case of *U. S. v. Bohl* to the effect that "section 5 (of the Renovated Butter Act of 1902) goes to the commerce clause as the fountain whence its vigor springs," to support their contention that the Renovated Butter Act is bottomed upon the commerce power and that its true purpose is the regulation of commerce. Both counsel, and the District Judge in stating his dictum, seem to have overlooked the fundamental principle which this Court has formulated as a guide to be used in determining the nature of the power exerted by Congress and the object sought to be obtained in the enactment of such provisions. This principle is that the expositor must look to the face of the act as a whole—not to a single isolated section—in order to determine its true character. *Sonzinsky v. U. S.*, 300 U. S. 506, 513; *McCray v. U. S.*, 195 U. S. 27; *Nigro v. U. S.*, 276 U. S. 332, 353, 354. This Court, in considering the act in its entirety, has held in effect that the regulatory provisions were in execution of or supplementary to those portions of the statute imposing taxes. *In re Kollock*, 165 U. S. 526, 533; *Plumley v. Mass.*, 155 U. S. 461.

It is to be remembered that the Renovated Butter Act of 1902, 32 Stat. 193, was but an amendment and an extension of the Oleomargarine Act of 1886, 24 Stat. 209. This Court, in considering the Act of 1886 in *In Re Kollock*, 165 U. S. 526, 537 observed:

> "The oleomargarine legislation does not differ in character from this, and the object is the same in both, namely, to secure revenue by internal taxation and to prevent fraud in the collection of such revenue. *Protection to purchasers in respect of getting the real and not a spurious article cannot be held to be the primary object in either instance*, and the identification of dealer, substance, quantity, etc., by marking and branding *must be regarded as means to effectuate the objects of the act in respect of revenue.*" (Emphasis supplied)

At the October Term, 1903, there was presented to this Court, in *McCray vs. United States*, 195 U. S. 27, the validity of the 1902 Act. Mr. Justice White, in speaking for the Court, in his summary of the provisions of the 1902 Act, notes:

> "The section in question (Sec. 1) as well as those following it, contain many administrative provisions for the enforcement of the taxes levied by the Act and concerning interstate and foreign commerce in the articles referred to".

The Court, in reaching the conclusion that the Act was constitutional and that it was not an un-

warranted encroachment upon, and an interference with the police powers reserved to the several states and to the people of the United States, concluded:

> *"In determining whether a particular Act is within a granted power, its scope and effect are to be considered.* Applying this rule to the acts assailed, it is self-evident that on their face, they levy an excise tax. That being their necessary scope and operation, it follows that the acts are within the grant of power." (195 U. S. 59) (Emphasis supplied)

It is to be noted that the Court declined to consider the contention urged upon it, that the motive of Congress was to regulate and not to tax, and rested the decision upon the conclusion reached by Mr. Chief Justice Fuller in *In Re Kollock* (165 U. S. 536) that

> "The Act before us is on its face, an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue".

Thus it appears that the intention of Congress, in enacting this statute, must be derived from the language of the whole act. The mere fact that a provision for regulation is included in the statute is certainly no indication, in and of itself, that Con-

gress intended to preempt the field of regulation, but must, we submit, be considered only as a provision by Congress for the enforcing of its taxing statutes."[7]

This Court, in *Whipple v. Martinson*, 256 U. S. 41, considered the identical proposition here presented. There considered was a statute of the State of Minnesota regulating traffic in narcotic drugs. One of the grounds of attack upon the statute was that it conflicted with the terms and provisions of the Federal Harrison Anti-Narcotic Drug Act, 38 Stat. at L., 785, and was, therefore, beyond the power of the State to enact. We think the parallel between the present case and the Whipple case so exact that, at the risk of overly extending this brief, we quote in extenso from Mr. Justice Day's opinion:

> "As to the alleged inconsistency between the state statute and the Harrison Anti-Narcotic Drug Act, the state court held that there was no substantial conflict between the two enactments. The validity of the Harrison Act was sustained by this court in *United States v. Doremus*, 249 U. S. 86, 63 L. ed. 493, 39 Sup. Ct. Rep. 214, as a valid exercise of the authority of Congress under the power conferred by the Constitution to levy excise taxes. The provisions of the statute regulating

---

[7] Cf. *Magnano Co. vs. Hamilton*, 292 U. S. 40, 47.

[8] In *Kelly v. Washington*, 302 U. S. 1, at page 13, it is observed: "The fact that federal regulations were (are) numerous and elaborate does not extend them beyond the boundary they established."

the sale, dispensing, or prescribing of drugs were held to bear a reasonable relation to the collection of the taxes provided for, and to be valid although the statute affected the conduct of a business which was subject to regulation by the police power of the state.

"It may be granted that the state has no power to enact laws which will render nugatory a law of Congress enacted to collect revenue under authority of constitutional enactments. See *Savage v. Jones*, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; *McDermott v. Wisconsin*, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A. (N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39. But we agree with the state court that there is nothing in this statute which prevents enforcement of the revenue act in question. It is true that the provisions regulating the sale, dispensation, and disposition of the prohibited drugs are somewhat different in the two acts. The prohibitory measures of the Federal statute do not apply to the disposition and dispensation of drugs by physicians registered under the act in the regular course of professional practice, provided records are kept for official inspection. Under the state law physicians can only furnish prescriptions to addicts, and may not dispense the drugs to such persons at pleasure from stocks of their own.

"There is certainly nothing in this state enactment, as construed by the supreme court of Min-

nesota, which interferes with the enforcement of the Federal revenue law, and we agree with the state court that there is no conflict between the enactments such as will prevent the state from enforcing its own law upon the subject."

We have but to paraphrase the above statement to see its clear analogy:

"As to the alleged inconsistency between the state statutes (and the official procedure thereunder) and the Renovated Butter Act, the Circuit Court of Appeals held that there was no substantial conflict between the two. The validity of the Renovated Butter Act was sustained by this court in *McCray vs. U. S.*, 195 U. S. 27, as a valid exercise of the authority of Congress under the power conferred by the Constitution to levy excise taxes. The provisions of the statute regulating the manufacture and sale of renovated or process butter were held to bear a reasonable relation to the collection of the taxes provided for, and to be valid although the statute affected the conduct of a business which was subject to regulation by the police power of the state.

"There is certainly nothing in this state enactment (or the official procedure under it) as stipulated upon by counsel and as construed by the Circuit Court of Appeals, which interferes with the enforcement of the Federal revenue law, and there is no conflict between the enactments such as will prevent the state from enforcing its own law upon the subject."

2.

*Assuming that the Renovated Butter Act was intended as a regulation of commerce, Congress has specifically indicated its will that renovated or process butter may be subjected to restrictions by the State, even though interstate commerce be affected.*

Counsel in opening their argument in the brief here submitted (page 24) pose the following question:

---

"What more could Congress do than it has done to exclusively occupy the field of inspection of raw materials in interstate commerce going into the manufacture of process or renovated butter?"

We shall presently give our attention to this question. First, however, we counter with the following question:

"How could Congress more clearly have expressed its intent to authorize and permit state inspection and regulation of packing stock butter delivered to the manufacturing plant within the State?"

The language of the Renovated Butter Act is certain and definite in its authorization of state control of renovated or process butter, and in its denial to the taxpayers under the act of the right to carry

on their business contrary to state statutes or regulations.

The Renovated Butter Act, as above noted, imposes certain special taxes upon manufacturers of renovated or process butter, as well as upon wholesale or retail dealers in that product. It is expressly declared (Section 4, 32 Stat. 195)

> "And Sections *** 3243[*] of the Revised Statutes of the United States are, so far as applicable, made to extend to and include and apply to the special taxes imposed by this section and to the persons upon whom they are imposed."

Section 3243 of the Revised Statutes of the United States is as follows:

> "The payment of any tax imposed by the internal revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State or in places prohibited by municipal law; nor shall the

---

[*]Section 3243 of the Revised Statutes, Title Internal Revenue, is carried forward in the exact language as Section 3276 of the United States Internal Revenue Code of 1939 (U.S.C.A., Title 26), and is still in full force and effect.

payment of any such tax be held to prohibit any State from placing a duty or tax on the same trade or business, for State or other purposes."

This Court has heretofore had occasion to consider the purpose of Congress in incorporating into a statute the provisions of Section 3243 of the Revised Statutes.

In *Plumley vs. Massachusetts*, supra, p. 466, it is stated:

"It is manifest that this section was incorporated into the act of August 2, 1886, to make it clear that Congress had no purpose to restrict the power of the States over the subject of the manufacture and sale of oleomargarine within their respective limits. The taxes prescribed by that act were imposed for national purposes, and their imposition did not give authority to those who paid them to engage in the manufacture or sale of oleomargarine in any State which lawfully forbade such manufacture or sale, or to disregard any regulations which a State might lawfully prescribe in reference to that article."

Attention is particularly directed to the fact that the Plumley case was decided some six years before the enactment of the Renovated Butter Act of 1902. It must be assumed, under the well established rule of statutory construction, that Con-

gress, in inserting the provision above quoted in Section 4 of the Renovated Butter Act of 1902, intended that a construction should be placed upon it similar to that given the identical provision in the Plumley case.

With this fact in mind, it is respectfully submitted that this Court can reach no other conclusion than that Congress intended to make it clear that the power of the States over the subject of the manufacture and sale of process and renovated butter within their respective limits was to be unrestricted, even though the effect of such regulation might be the imposition of an indirect burden upon interstate commerce.[11]

The incorporation into the Renovated Butter Act of Section 3243 of the Revised Statutes, Title Internal Revenue, is not the only specific indication of the Congressional intention to leave the State unrestricted in the exercise of its lawful police power. A further indication of the will of Congress that interstate commerce might be subjected to restrictions on the part of the States, with respect to the regulation of process or renovated butter, is the provision contained in Section 1 of the Act:

"That all articles known as oleomargarine, butterine, imitation, process, renovated, or adulter-

---

[11] *Austin vs. Tennessee*, 179 U. S. 343, 363; *Schollenberger vs. Pennsylvania*, 171 U. S. 1;, 28; *Savage vs. Jones*, 225 U. S. 501.

ated butter, or imitation cheese, or any substance in the semblance of butter or cheese not the usual product of the dairy and not made exclusively of pure and unadulterated milk or cream, transported into any State or territory or the District of Columbia, and remaining therein for use, consumption, sale, or storage therein, shall, upon the arrival within the limits of such State or Territory or the District of Columbia, be subject to the operation and effect of the laws of such State or Territory or the District of Columbia, enacted in the exercise of its police power to the same extent and in the same manner as though such articles or substances had been produced in such State or Territory or the District of Columbia, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." (32 Stat. 193)

Here again, we find Congress adapting to the Renovated Butter Act of 1902, the provisions of another statute which had been construed by this Court. The provisions of Section 1 of the Renovated Butter Act are identical in every respect (save the changes made to conform the provisions to the nature of the subject dealt with) to the provisions of the Act of Congress of 1890, the so-called Wilson Act (26 Stat. 313) which provided:

"That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use,

consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." (p. 205)

The obvious purpose of inserting Section 1 into the Renovated Butter Act of 1902 was clearly to assert the Congressional intention that the State might act to protect the health of its citizens with respect to unclean butter, even though such butter, renovated or packing stock, might still remain in the original packages in which it had been introduced into the State."

In *In re Rahrer* 140 U. S. 545, this Court, in considering the effect of the provision of the Wilson Act above quoted, after noting that the act provided that imported liquors should be subject to the operation and effect of the State laws to the same extent and in the same manner as though the liquors had been produced in the State, observed:

---

"Indicative of the Congressional thought concerning the addition of Section 1 to the Renovated Butter Act of 1902, are statements of Sen. Spooner, an advocate of the bill. Congressional Record, Senate Volume 35, Part 4, pp. 3604, 3605, Fifty-seventh Congress 1st Session). (See Appendix page 59.)

"Appellant was thereby prevented from claiming the right to proceed in defiance of the law of the State, upon the implication arising from the want of action on the part of Congress up to that time. The laws of the State had been passed in the exercise of its police powers, and applied to the sale of all intoxicating liquors whether imported or not, there being no exception as to those imported, and no inference arising, in view of the provisions of the state constitution and the terms of the law, (within whose mischief all intoxicating liquors came), that the State did not intend imported liquors to be included. We do not mean that the the intention is to be imputed by violating any constitutional rule, but that the State law should not be regarded as less comprehensive than its language is, upon the ground that action under it might in particular instances be adjudged invalid from an external cause. (140 U. S. 564)

A like conclusion is reached in *Clarke Distilling Company vs. Western Maryland Ry.*, 242 U. S. 311, involving the so-called Webb-Kenyon Law.

It must be remembered, too, that the Renovated Butter Act of 1902 is captioned, in part,

"An act to make oleomargarine, and other imitation dairy products, subject to the laws of any State or Territory or the District of Columbia into which they are imported."

It is earnestly submitted that each of the provisions of the statute and the title of the statute, to which reference has been hereinabove made, clearly indicate that Congress was not concerned with interfering, nor in attempting to interfere, with any of the states in the matter of regulating the purity of the kind of product here considered. Simply stated, these provisions manifest the understanding of Congress that the nature of the subject is not such as to require exclusive legislation. Cf. *Hartford Accident and Indemnity Co. v. Ill.*, 298 U. S. 156, 159.

But, it has been argued below by petitioner, Congress did not, by the insertion of Section 1 of the Act, make raw materials for manufacture into butter subject to state laws. The weakness of this contention is self-apparent. This Court, in *In re Rahrer*, 140 U. S. 545, 557, recognized the right of a state, as an incident to its power to regulate, to "use means to ascertain the fact(s)". Of consequence, as observed by the Circuit Court of Appeals of the Fifth Circuit, in its opinion in this cause, it should not be implied from the statute that the Congress which had declared that the finished product, when introduced into a State, would be subject to the laws of that State, intended by that same act to exclude the State of manufacture from the regulation of ingredients used in the manufacture, with the result that persons might set up as manufacturers in particular states under the protection of Congress and then import into them and use, in the manufacture of food products therein, impure or unfit products,

free from inspection by and regulations of, the State, designed to prevent such importation and use.

Or, in other words, stating the necessary result of the argument of counsel from a concrete consideration of the particular subject here involved, that though Congress, in enacting the Renovated Butter statute, had considered the nature and character of our dual system of government, State and Nation, and instead of absolutely prohibiting, had so conformed its regulation as to produce cooperation between the local and national forces of Government, to the end of preserving the rights of all, it had thereby removed from the States control over the packing stock butter which might or might not later be used in the manufacture of process or renovated butter shipped partially in interstate commerce and partially sold in Alabama. The abnormal result to which this argument leads is at once apparent. It was obvious to the Circuit Court of Appeals, and it can be none the less obvious to this Court, that the argument of petitioner virtually comes to the assertion that in some undisclosed way, by the exertion of Congressional authority, seeking to convey additional powers to the States, or to remove restrictions on existing powers, power once possessed by the State of Alabama, has evaporated."

We do not believe that this Court will be influenced by such an argument.

---

"Cf. the logic employed by Chief Justice White in *Clark Distilling Co. v. Western Maryland Ry.*, 242 U. S. 311, 327-28.

It is, therefore, earnestly insisted that since Congress has clearly indicated its recognition of the right of the State of Alabama to regulate the manufacture and sale of renovated or process butter, the Court of Appeals was correct in declining to find in the statute radiations beyond the obvious meaning of the language therein used."

3.

*Assuming that the Renovated Butter Act is "regulation of commerce" and that Congress has not specifically indicated its will to allow state restrictions, nevertheless the Act does not operate to render inoperative the States' right of control in cases of this kind.*

We have previously referred to the question posed by counsel for petitioner. We now propose to answer it. The question asked is: (Brief p. 24)

"What more could Congress do than it has done to exclusively occupy the field of inspection of raw materials in interstate commerce going into the manufacture of process or renovated butter?"

A further question presented is:

"What may the State of Alabama do in the way of inspecting raw material in interstate commerce going into the manufacture of process or renovated butter that the Secretary of Agriculture of the

---

"*Federal Trade Commission v. Bunte Bros., Inc.*, No. 85, decided February 17, 1941.

United States is not authorized to do by the Federal law and the regulations, which have the force and effect of law, promulgated pursuant to the mandate of the Federal Statute?"

The Court cannot fail to observe that whereas counsel have stated in their Proposition A (Brief p. 23) that:

> "Congress has preempted the field of *inspection and regulation* of packing stock butter in interstate commerce" (Emphasis supplied)

the questions propounded as the core around which they proceed to wind their argument include reference to inspection only. They ask:

> "What more could Congress do *** to exclusively occupy the field of *inspection*?" and "What may the State of Alabama do in the way of *inspecting* *** ?" (Emphasis supplied)

Nowhere in the brief is there presented evidence to show preemption of the *regulatory* field by the Federal Renovated Butter Act. That this also is necessary is apparent when we look to the prayer of the bill for injunction (R. pp. 18, 19). Its broad aspects cannot be overlooked in determining the issues here presented.

So it is evident that even though both questions are answered as petitioner would have them answered (i e., Congress could have done no more than it has done to exclusively occupy the field of inspection,

and the State of Alabama may do nothing in the way of inspecting raw material in interstate commerce going into the manufacture of process or renovated butter that the Secretary of Agriculture cannot do), petitioner has still failed to establish his proposition that "Congress has preempted the field of inspection *and regulation* of packing stock butter in interstate commerce." (Emphasis supplied)

If counsel cannot establish that there exists a *regulation* of packing stock butter, then of course, petitioner has no standing whatsoever. For certainly the mere right of Federal inspection of packing stock butter cannot exclude State regulatory action. Inspection without power to take action where the findings warrant it certainly affords no protection to the citizens of Alabama. Where then are they to look for protection? Obviously only to the *State* authorities constituted and empowered to provide it.

We have stated that counsel for petitioner have failed to point out wherein there exists in the Renovated Butter Act power to *regulate* packing stock butter as such. We believe their neglect in this regard is certainly not attributable to a lack of willingness on their part to do so; rather, we believe the omission is due to the impossibility of the task. This impossibility is best demonstrated by a consideration of the statute and the regulations adopted thereunder.

In considering the statute and regulations in our search for this alleged exclusive power to regulate packing stock butter, we must ascertain two facts:

(1) What has Congress done by law?

(2) What has the Secretary of Agriculture done pursuant to such law?

The "regulatory" provisions of the statute are as follows:

"And the Secretary of Agriculture is hereby authorized and required to cause a rigid sanitary inspection to be made, at such times as he may deem proper or necessary, of all factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market, and of the products thereof and materials going into the manufacture of the same. *** and shall cause to be ascertained and reported from time to time the quantity and quality of process or renovated butter manufactured, and the character and condition of the material from which it is made. And he shall also have power to ascertain whether or not materials used in the manufacture of said process of renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States or in course of exportation or shipment he shall have

power to confiscate the same." (Section 5, Act of May 9, 1902; 32 Stat. 196)

From these provisions it appears that Congress has authorized and *required* the Secretary of Agriculture (1) to cause a rigid sanitary inspection to be made of renovated or process butter plants and of the products thereof and the materials going into the manufacturing; (2) to report the *quantity* and quality of process of renovated butter manufactured; (3) to report the condition of the material from which it is made.

It has given the Secretary of Agriculture the *power*, but has *not required* him, (1) to ascertain whether the materials used in the manufacture of process or renovated butter are deleterious to health or unwholesome *in the finished product*; to confiscate the *finished product* if deleterious or unwholesome materials are found to be used in it.

Neither the Regulations of the United States Treasury Department, Bureau of Internal Revenue, as revised April, 1936 (Appendix p. 62), nor the regulations adopted by the United States Department of Agriculture and issued December 24, 1936 (petitioner's Appendix to Brief, p. 79), extend beyond the authorization of the law above noted, and quite properly so.

Counsel has referred to the Revenue Act of 1912 incorporating by reference, in the Renovated Butter

Act, the provisions of the Meat Inspection Act, but they fail to particularly point out any provision thereof which grants to the Secretary of Agricuture power to *regulate* packing stock butter as such, including the power to seize and confiscate such butter in its packing stock form. Our study of this act reveals no attempt to confer such power.

Our examination of the statutes and regulations which petitioner insists have given the Secretary of Agriculture the exclusive power to control packing stock butter delivered to a manufacturing plant in Alabama therefore reveals a delegation of power and a mandate to *inspect* only.

There is *no* attempt on the part of Congress to *regulate* packing stock butter nor to authorize the Secretary of Agriculture to *regulate* it.

It cannot be too clearly emphasized that while inspection work is a means to accomplish regulation, it is not regulation itself.

Outside of the penalties in the act directed against the failure of payment of the taxes levied and the failure to keep proper records, the only regulatory force placed in the hands of the Secretary of Agriculture is the grant of *power* to confiscate renovated or process butter, *not* the packing stock, in interstate commerce. There is even here no *mandate* to confiscate!

Nowhere in the statute or regulations is regulatory action directed against the material, the packing stock butter, from which renovated or process butter is made. True, in Sections 1 and 2 of Reg. 4 of B. D. I. Order No. 1 (petitioner's Brief, Appendix p. 85), it is provided:

> "Section 1. 'Rigid' sanitary inspections will also be made of the character and condition of the materials going into the manufacture of process or renovated butter and of the quantity and quality of process or renovated butter manufactured.
>
> "Section 2. Due care must be taken to prevent process of renovated butter, in any state of its manufacture, from falling on the floor, and in the event of its having so fallen, the soiled portion shall not be used. Butterfat collected from floors, drains, or catch basins shall not be used in the manufacture of process or renovated butter."

but nowhere in the statute or regulations do we find appropriate provision (either authority to confiscate or prosecute) for enforcement. Indeed, we take it, no such provision could be validly included in the regulations, there being an absence of statutory authority therefor. *U. S. v.* 11,150 *Pounds of Butter*, 195 Fed. 657, 664.

It is upon this statute with its limited effect and restricted scope that petitioner bases its contention that officials of the State of Alabama should be ex-

cluded from inspecting its plant and its packing stock butter. It is this statute which petitioner says warrants a denial of the right of the State officials to inspect its plant or storehouse, its packing stock butter or other materials employed in the making of renovated or process butter.

Petitioner advances these contentions in the face of an admitted sale in Alabama of at least ten per cent of its output of renovated or process butter.

The Circuit Court of Appeals recognized this proceeding for what it is: an action by petitioner "attempting to magnify and enlarge the actual scope of the federal law, to use it as a shield against or a cat's paw to draw his chestnuts from the fire as to state regulations".

We submit, however, that petitioner's scheme is doomed because of the utter lack of evidence either tending to show a Congressional intention to exclude the state officers from the field or tending to show that the State Statutes or the method of enforcement thereof interfere with the enforcement of the Federal law.

## C.

**The decisions of this Court establish the doctrine that state officers enforcing by seizure police regulations with regard to foods will not be enjoined merely because there exist similar Federal laws and regulations in respect to the same subject matter and there has been no Federal seizure.**

Taking our cue from this Court we have first considered the provisions of the statutes and the regulations here at issue—this upon the theory "that the proper point of beginning in the consideration of the scope of any disputed statute (or regulation) is with the words of the statute itself".

We now come to a consideration of the general principles upon which this case is to be decided. Petitioner relies in the main upon the following cases to support his position that the Renovated Butter Act operates to exclude state officials from inspecting petitioner's plant and from inspecting or seizing petitioner's packing stock butter:

*Napier v. Atl. Coast Line R. R. Co.*, 272 U. S. 606;
*Northern Pacific R. R. v. Wash.*, 222 U. S. 370;
*Southern R. R. v. Reid*, 222 U. S. 424;
*Missouri-Pacific R. R. v. Stroud*, 267 U. S. 404;
*L. & N. R. R. Co. v. State*, 16 Alabama App. 199;
*C. R. I. & P. v. Hardwick Co.*, 226 U. S. 426;
*Adams Express Co. v. Croninger*, 226 U. S. 491;
*Erie R. R. v. New York*, 233 U. S. 671;
*New York Central R. R. v Winfield*, 244 U. S. 147;
*Erie R. R. Co. v. Winfield*, 244 U. S. 170;
*Charleston & W. C. R. R. Co, v. Varnville Furniture Co.*, 237 U. S. 597
*Mo. Pac. Co. v. Porter*, 273 U. S. 341.

} Hereinafter called the "Railroad Cases".

*Hines v. Davidowitz*, 85 L. ed. 366;

*Oregon-Wash. R. R. Co. v. Wash.*, 270 U. S. 87;

(Petitioner's Brief, pp. 14-17.)

Counsel is insisting that the Circuit Court of Appeals fell into error in applying to the facts in this case, as analogous, the cases of *Mintz vs. Baldwin*, 289 U. S. 346; *Pacific States Co. vs. White*, 296 U. S. 176; *Kelly vs. Wash.*, 302 U. S. 1; *S. C. Highway Department vs. Barnwell Bros.*, 303 U. S. 177; *Townsend vs. Yeoman*, 301 U. S. 441; and *Currin vs. Wallace*, 306 U. S. 1, rather than the cases upon which petitioner now relies.

It will not be here denied that in each of the cases relied on by petitioner this Court has held a Federal statute exclusive in its own field. It will not be denied that in each of the cases State action has been held to have been superseded by Federal legislation.

We do not think, however, that any of the cases upon which petitioner relies, are here controlling. To paraphrase Mr. Justice Douglas' comments in *Nelson v. Sears Roebuck and Co.*, No. 255, decided February 15, 1941, 85 L. ed. 525:

> "Particular facts of specific cases determine whether a given statute preempts State regulation indirectly affecting interstate commerce. Hence a review of prior adjudications based on widely disparate facts, howsoever embedded in general propositions, does not facilitate an answer to the present problem."

A brief consideration will suffice to illustrate the vast disparity of both fact and logic between the line

of cases upon which petitioner rests his claim and that upon which the Court of Appeals and this Brief proceed.*

Typical of the cases cited by petitioner, is the *Napier* case, 272 U. S. 606. Typical of the cases relied on by the Court of Appeals and by appellee, is *Mintz vs. Baldwin*, 289 U. S. 346. Let us examine these two cases and the rationale of each. Let us compare them in their essential facts.

The *Napier* case concerned itself with the construction of the Federal Locomotive Boiler Inspection Act. The question was whether that act had occupied the field of regulating locomotive equipment used on a highway of interstate commerce so far as to preclude State legislation.

The *Mintz* case considered the Cattle Contagious Diseases Acts. The question there was whether those acts precluded State legislation on like subjects.

In the *Napier* case, the State of Georgia had enacted statutes prescribing an automatic door to the fire box and a cab curtain for use on locomotives. In the *Mintz* case, the State of New York had enacted a statute requiring that cattle should not be imported for dairy or breeding purposes without a certificate certifying them to be free from disease.

---

*Excellent reviews of the decisions of this Court relating to the supersedure of state laws by Federal statutes and regulations are found in the following legal periodicals:

41 Harv. L. Rev. 200; 37 Col. L. Rev. 43; 34 Col. L. Rev. 995, 1027, 1038; 46 Yale L. J. 599; 86 Penn. L. Rev. 532; 12 Minn. L. Rev. 607.

In neither the *Napier* case nor the *Mintz* case had Congress, by specific language directed to that end, covered the particular action taken by the State.

But in the *Napier* case it was held that the Boiler Inspection Act "was intended to occupy the field", whereas in the *Mintz* case, the Court declined to find that the entire field had been occupied, and instead, found a field of operation for the State statute.

Why this distinction?

In the *Mintz* case it is stated,

> "The purpose of Congress to supersede or exclude action against the ravages of disease is not lightly to be inferred. The intention so to do must definitely and clearly appear".

It is to be seen, therefore, that the cases fall into several different categories.

In the first category, it seems, are those cases where the power of Congress is absolutely exclusive. These are the cases where the subjects are national in their character or admit only of one uniform system or plan of regulation. *Gilman vs. Philadelphia*, 3 Wall. 713; *Brown vs. Houston*, 114 U. S. 622; *Leisy vs. Hardin*, 135 U. S. 100; *Robbins vs. Shelby County Taxing Dist.*, 120 U. S. 489; and *Hines v. Davidowitz*, supra, are a few of the many cases announcing this principle. The case with which we are now concerned obviously does not fall under this first category.

A second classification of cases includes those where matters of local concern are involved. These are the cases with which we now deal. In considering the opinions treating these cases, said to be of local concern, we see that this second classification has been further subdivided by this Court. In one series of cases, the Railroad cases, of which the *Napier* case is typical, the Court has found that Congress has preempted the field. In the other group of cases, of which *Mintz vs. Baldwin* is typical, a different view is obtained. One clue to this distinction has been quoted above from the *Mintz* case.

A further clue to the basis for the distinctions made is found in *C. R. I. Ry. Co. vs. Hardwick Elevator Co.*, 226 U. S. 426, 435, wherein it is stated that insofar as legislation relating to railroads is concerned, the State "had no inherent, but only permissive power". 226 U. S. 435. In *Adams Express Co. vs. Croninger*, 226 U. S. 491 at p. 506, the Court remarks with respect to the right of the State to regulate the liability of a carrier for a loss or damage of property carried,

> "Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts".

Again, in *Missouri Pacific vs. Porter*, 273 U. S. 341, we find it stated with respect to the power of Congress over railroads, that,

"Its power to regulate such commerce and all instumentalities is supreme". 273 U. S. 346.

It will be seen, therefore, that each of the Railroad Cases cited by counsel for petitioner pivot on the proposition that the State *had no inherent right to regulate the subject*, and that once Congress had spoken, the State must remain inactive. This Court has treated these cases as a group and as each new set of facts arises, has applied to it the rules formulated to govern the group.

The case of *Oregon-Wash. R. R. v. Wash.*, 270 U. S. 87, seems to stand alone in the decisions of this Court. Since the holding, there has been much speculation by writers that this Court would be more hesitant to assume such a strict construction of the application of the doctrine of occupancy of the field of action. In the cases of *H. P. Welch Co. v. State of New Hampshire*, 306 U. S. 72; *Eichholz v. Public Service Commission*, 306 U. S. 268; and *Maurer v. Hamilton*, 309 U. S. 598, there is a decided indication that this speculation has turned into reality. These cases seem to agree that no sound reason can be given for the rule that where the effectiveness of Congressional legislation has been postponed in a field of action affecting the vital interests of a state, the state's power to act has been precluded, when state regulations in no way conflict with, hinder, embarrass or obstruct federal authority. The recent authority has shown that the supersedure of state authority may be held to occur where there

is *effective* Federal action, but not until that point has been reached.

The case of *Prigg vs. Pennsylvania*, 16 Peters 539, represents another category into which these cases may be placed. There, the State legislation considered operated in conflict with an implied prohibition in the Constitution. It was there held that a statute of Pennsylvania making it a felony to take and carry negroes for the purpose of returning them as slaves, interfered with the right of the owner to reclaim his slaves, which right was derived from the Constitution of the United States. The line of cases represented by the Prigg case rest on the proposition that no state may trench on the province of Congress to determine whether the paramount interest of the nation demands nation-wide or local action—for Congress is particularly charged by the Constitution with the responsibility for these functions of government.

The cases upon which the Circuit Court of Appeals lays its decision, and the additional authorities to a like view collected in this brief, and upon which we rely to support the proposition stated at page 36, rest on a construction of statutes involving action by states in matters in which they have an inherent right to act. Matters involving the health of their

citizens." Matters involving action by the State directed to the protection of its citizens from fraud and deceit." State measures intended to mitigate the destruction of life, limb, or property and definitely to insure the safety of its citizens."

The right exercised by the states in these cases depended neither on the action nor on the inaction of Congress. The subjects regulated in each of them were not essentially matters of national concern. The states did not act through the permission of Congress. In each of them the state's right to regulate the subject considered was upheld despite vigorous protests that "Congress had entered and preempted the field". . .

---

"*Plumley vs. Massachusetts*, 155 U. S. 461 (oleomargarine colored to look like butter); *Crossman vs. Lurman*, 192 U. S. 189 (adulterated coffee; this case involves foreign commerce); *Sligh vs. Kirkwood*, 237 U. S. 52 (immature fruits unfit for human consumption); *Savage vs. Jones*, 225 U. S. 501 (involving a statute requiring a statement of ingredients contained in butter products); *Asbell vs. Kansas*, 209 U. S. 251 (inspection of diseased cattle); *Reid vs. Colorado*, 187 U. S. 137 (penalizing the importation of cattle); and Cf. *Carey vs. So. Dakota*, 250 U. S. 118 (protection of migratory birds).

"*Corn Products Ref. Co., vs. Eddy*, 249 U. S. 427 (label of syrup compounds); *Hebe Co. vs. Shaw*, 248 U. S. 297 (labeling of condensed milk); *Merchants Exchange vs. Missouri*, 248 U. S. 365 (weighing of grain); *Townsend vs. Yeomans*, 301 U. S. 441 (maximum charges for the sertices of warehousemen); *Pacific States Co. vs. White*, 296 U. S. 176 (regulating standards for the containers in which horticultural products are marketed); *Powell vs. Pennsylvania*, 127 U. S. 678 (prevention of deception in sales of butter and cheese).

"*Welch Co. vs. New Hampshire*, 306 U. S. 72 (regulation of time of service of drivers of motor carriers); *S. C. Highway Department vs. Barnwell Bros.*, 303 U. S. 177 (limitation of width and weight of vehicles used on highways); *Maurer vs. Hamilton*, 309 U. S. 598 (car over cab method of transportation restricted); *Kelly vs. Wash.*, 302 U. S. 1 (prevention of operation of unsafe or unseaworthy vessels); *Missouri P. R. Co. vs. Norwood*, 283 U. S. 249; 257 (safety of train crews).

The instant case is compatible with the above authorities in the nature of the subject regulated and in the absence of need for Congressional permission to begin action. It is submitted, therefore, that it should be controlled by the rule of these authorities rather than those relied upon by petitioner, shown to rest on distinctly different theories.

Counsel's argument that the test stated by the Circuit Court of Appeals and styled by counsel the "Compliance-Defiance" test, has been repudiated or rejected is without substantiation in cases involving State action under its police power to protect the health and safety of its citizens under circumstances involving local control. On the contrary, in such cases the test has been repeatedly applied.* For instance, in *Hartford Accident and Indemnity Co. v. Ill.*, 298 U. S. 155, the "Compliance-Defiance" test appears in the following language:

> "The appellant urges, however, that Congress has adopted an act regulating the same business and the Cross Company was required to take a license under that act. This alone is not sufficient to nullify the state law, if the Federal act does not cover the same field, *or is consistent with it.*"

In *Carey v. State of South Dakota*, 250 U. S. 119, 122, the same test is applied, the Court stating:

> "The intent to supersede the exercise by a state of its police powers is not to be implied unless the

*See many cases cited by Mr. Justice Stone in the dissenting opinion in *Hines v. Davidowitz*, No. 22, 1940 Term; 85 L. ed. at page 379.

act of Congress, fairly interpreted, is in actual conflict with the law of the state."

We do not deny that the "Compliance-Defiance" test has not been applied in the Railroad Cases upon which the petitioner relies, or in the case of *Oregon-Wash. R. R. Co. vs. Wash.*, 270 U. S. 87, considered supra. We think, however, that we have successfully shown the factual and legal distinction between these cases and those upon which we rely.

It is, therefore, earnestly insisted that the applicable authorities sustain the contention here urged that the State's action, being bottomed on the broad base of the protection of public health and welfare does not stand "as an obstacle to the accomplishment of the full execution of the purposes and objectives" of the Act of Congress, known as the Renovated Butter Act of 1902, and consequently its exercise should not be restricted by this Court."

---

*Cf. *Hines v. Davidowitz*, No. 22, decided January 20, 1941, 85 L. ed 366, 372.

## II

## THE CIRCUIT COURT OF APPEALS DID NOT ERRONEOUSLY FAIL TO FOLLOW THE CONSTRUCTION PLACED ON THE AGRICULTURAL CODE BY THE SUPREME COURT OF ALABAMA IN *STATE VS. CECIL*, 216 ALA. 391.

Petitioner's insistence that the Supreme Court of Alabama in *State vs. Cecil*, 216 Alabama 391, has held that the enactment of the Agricultural Code was within the exercise of the police power of the State, but that the operation of the Code was confined to intrastate commerce, (Brief p. 50) reveals that petitioner has apparently overlooked two facts.

The first fact is that the Supreme Court of Alabama in the *Cecil* case did not consider the *entire* Agricultural Code, but limited its considerations to Article 23 of the 1923 Act (Act No. 376, H. 570, approved September 27, 1927, General Acts of 1923, p. 463), which act the Court refers to as the "Agricultural Code of 1923".* It is obvious that the Agricultural Code of 1927, which became effective on October 1, 1927, could not have been the subject of discussion in a decision rendered on April 7, 1927, as was the decision in the *Cecil case*. It is clear too, from an examination of the Agricultural Code of 1927, that Article 23 of the Agricultural Code of

*Copies of both the Agricultural Code of 1923 and the Agricultural Code of 1927 have been filed in the office of the Clerk of this Court for convenient reference by the Court.

1923 appears in the Agricultural Code of 1927 as "Article 25", rather than "Article 23".[*]

It is apparent, therefore, that the Supreme Court in the *Cecil* case, considered only the provisions of the Agricultural Code of 1923 relating to the sale of farm products on commission,[**] and nothing therein can be deemed to indicate an intention to construe Article 23 of the Agricultural Code of 1927, (relating to suspension from sale of articles seized) or Article 7 of the Agricultural Code of 1927 (relating to the misbranding or adulteration of foods and drugs).[***]

The second fact to which we have alluded above is equally as obvious. Assuming for the sake of argument that the Supreme Court of Alabama, had it been called upon to consider Articles 7 and 23 of the

---

[*]See Agricultural Code of Alabama, 1927, pp. 278-288.

[**]Article 25 of the 1927 Agricultural Code.

[***]Since this case was submitted to this Court, Alabama has adopted a new Code of laws, known as Code of Alabama, 1940. Tit. 2, Sec. 314 of this Code brings forward into the article particularly relating to foods (article 18) Section 4396 of the Alabama Code of 1923. This section is as follows:

"§314. (4396). *What is prima facie evidence of intent to violate article.* —The having in possession by any person, firm, or corporation who manufactures or exposes for sale any adulterated or misbranded food within the meaning of this article, shall be prima facie evidence of having in possession with intent to sell in violation of its provisions, *except that any manufacturer, wholesaler or jobber, may keep properly identified goods specially set apart in his stock for sale in other states which might otherwise be in violation of the provisions of this article.*" (1919, p. 1031.)

This provision affords petitioner ample protection against seizure by state officials of packing stock butter specially set apart for sale in other states, thus obviating any necessity for the injunction here sought. Especially is this true, in view of the fact that petitioner does not contend here, nor has he ever so contended that he is conforming to this statute.

Agricultural Code of 1927, would have given voice to the same views expressed in dealing with Article 23 of the Agricultural Code of 1923 (now Article 25 of the Agricultural Code of 1927), we are unable to perceive that it has limited State action upon matters of this kind. At most, it can be contended only that the Supreme Court of Alabama has held that the State act is not aimed directly at interstate commerce. This we do not deny. In fact, the entire burden of this brief is directed to a similar argument. We have contended throughout this brief that where the State act affects interstate commerce, it does so only incidentally and within a permitted field. This Court has many times determined that while a statute may not, considered in its own nature, operate as a regulation of interstate commerce, the same act may none the less affect commerce incidentally.*

The cases of *Stafford vs. Wallace*, 258 U. S. 495; *Dahnke-Wallace Milling Co. vs. Bondurant*, 257 U. S. 282; and *Chicago Board of Trade vs. Olsen*, 262 U. S. 1 cited by counsel for petitioner (Brief p. 51) in support of the argument that packing stock butter stored in petitioner's plant and mixed with other butter acquired in Alabama for manufacture into the finished product for sale and shipment, remains in interstate commerce, furnish no support for such a contention. In each of these cases the subjects dealt

*Cf. *Smith vs. Ala.* 124 U. S. 465, 482; *Minn. Rate Cases*, 230 U. S. 352; *S. C. Highway Dept. vs. Barnwell Bros.*, 303 U. S. 177.

with were "in the middle of the current of commerce". The stopping point in the states was considered to be merely a "throat through which the current flows". Such is obviously not the case here. Here the journey was ended for the packing stock butter. To paraphrase this Court's statement in *Bacon vs. Illinois*, 227 U. S. 504, at p. 516, "the property (the butter) was held by the petitioner for his own purposes and with full power of disposition".

It is, therefore, earnestly but respectfully submitted that the dissent of Judge Foster and the argument of counsel upon the proposition that the Court of Appeals erroneously failed to follow the Supreme Court of Alabama, fall of their own weight.

## CONCLUSION.

In conclusion, therefore, it is submitted: First, that the statute of Alabama, the operation of which is attacked, is not, considered in its own nature, a regulation of interstate commerce even when applied as in the case under consideration; Secondly, that both the act and the administrative procedure thereunder are properly within the scope of the admitted power reserved to the State of Alabama, and inherent in this state, to protect the health and welfare of its citizens and those of other States who might suffer because of the actions of its citizens; Thirdly, that so far as the statute, and the adminis-

trative procedure following it, affect transactions of commerce among the States, they do so only indirectly, incidentally, and remotely, and not so as to burden or impede them; and Finally, in the particulars in which such statute and such procedures under it touch those transactions at all, neither the statute nor the procedure is in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence.

Upon these reasons we base our contention that the judgment of the Circuit Court of Appeals for the Fifth District, which in effect denied to appellant the injunction by which appellant sought to restrain State officers from employing the most direct means of protecting the citizens of Alabama from injury or graud possibly resulting from the sale in Alabama of appellant's renovated or process butter, should be affirmed.

Respectfully submitted,

THOMAS S. LAWSON,
Attorney General of Alabama

WILLIAM H. LOEB,
Assistant Attorney General.

# APPENDIX

## AGRICULTURAL CODE OF ALABAMA OF 1927

Section 36. *Misbranding and Adulteration of Foods and Drugs.*—The purposes of this Article are to prevent the manufacture, possession, sale or delivery of adulterated or misbranded food and drugs, and for other purposes. The State Board of Agriculture shall have the power and authority, and it shall be its duty: (a) To promulgate all rules and regulations necessary to the accomplishment of the purposes of this Article and make effective its provisions; (b) To fix the standards of purity for all food and drug products which shall be, so far as practical, in accordance with the standards promulgated by the Federal Government through its duly authorized agents.

Section 37. *Possession: Sale and Delivery of Prohibited Articles.*—No person within this State shall manufacture for sale therein, have in possession with intent to sell, offer for sale, sell, or deliver any article of food or drugs which is adulterated or misbranded within the meaning of this Article.

Section 38. *Definition of Words and Terms.*—The word "article" when referring to food or drugs, is used in the broad and comprehensive sense and has reference to the food product or the drug product in question. The term "food" as used herein shall include all articles of food, drink confectionery,

or condiment, whether simple, mixed or compound, used or intended for use by man or domestic animals. The term "drug" as used herein shall include all medicines and preparations recognized in the U. S. Pharmacopoeia or National Formulary for internal or external use and any substance or mixture of substances to be used for the cure, mitigation or preventation of disease in man or domestic animals. The words "standard of purity or quality" herein used shall refer to and include the standards of purity for food products promulgated by the State Board of Agriculture and statutes of this State.

Section 39. *Adulteration of Food.*—An article shall be deemed adulterated in the case of food. First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength. Second If any substance has been substituted wholly or in part for the article. Third. If any valuable constituent of the artcile has been wholly or in part abstrated. Fourth. If it be mixed, colored, powdered, coated, stained, or otherwise treated in a manner whereby damage or inferiority is concealed, or in a manner whereby the appearance of said Article is improved; provided this shall not apply to the precoloring or processing of fruits where such precoloring or processing does not conceal damage or inferiority. Fifth. If it contains any poisonous or deleterious ingredient which may render such article injurious to health; Provided, that when in the preparation of food products for shipment they

are preserved by an external application applied in such a manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering of the package, the provisions of this Article shall be construed as applying only when said products are ready for consumption. Sixth. If it consist in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter. Seventh. If in the course of its preparation of manufacture an ingredient of inferior food value has been substituted in whole or in part for an ingredient of greater food value. Eighth. If it does not conform to the standard of purity or equality established for the article.

Section 217. As Amended by General Acts 1935 pp. 1102, 1103. *Section* 217.—*Suspension of Sale of Article.*—If at any time the Commissioner or his duly authorized agent, shall have reason to believe that any product or products or article mentioned in the succeeding sections of this Article, which are held in possession, delivered, kept, offered or exposed for sale in this State, do not comply with the requirements of this Article or other Article of this Code as to ingredients, substance, analysis, marking or labelling, weight or measure of the same, it shall be his duty by written order to suspend the sale of the same until he shall have satisfied himself, or

shall be satisfied by an analysis, or otherwise, that such product or article is made up, compounded or marked as required by law and rules and regulations under authority of law. If he shall find that the same dose not comply with such laws and rules and regulations, either before or after the making of such suspension order, then he is authorized to proceed with regard to the same as provided in the succeeding Sections of this Article, or he may order in writing the same to be held at his disposition pending the placement of such product or article in such condition as will met the requirements of such laws, rules and regulation, under the supervision and direction of the Commissioner or his duly authorized agent, or at the discretion of the Commissioner proceeding with regards to the same as provided in the succeding Sections of this Article. Provided in case the owner of such product or article denies by written notice to the Commissioner or his agent that the same is not in compliance with the laws, rules or regulations and requests a hearing thereon, the Commissioner or his agent shall as soon as practicable thereafter proceed as provided in the succeeding Sections of this Article, in order that the Court may hear and decide said issue and proceed as provided for in the succeeding Sections of this Article. Any person who moves, transports, sells or in any other manner disposes of any product or article after such product has been ordered suspended or held as hereinbefore provided shall be guilty of a misdemeanor and upon conviction thereof fined not more than Five Hundred ($500.00) Dollars or imprisoned for

not more than six months or both, provided that such product or article may be moved, transported or otherwise disposed of by and in compliance with written order by the Commissioner.

Section 218. *Proceeding to Condemn Seized Article.*—Any fertilizer, fertilizer material, ground limestone, paint, white lead, linseed oil, turpentine, kerosene or other illuminating oils, gasoline, benzine or other liquid motor fuels, insecticides and fungicides, commercial feeds, agricultural seeds, eggs, vinegar, sausage, milk, cream, ice cream or other dairy products, imitation butter and cheese, or any article of food or drug which is adulterated, misbranded or under standard, grade, weight or measure claimed within the meaning of any provision of this Code, and which is manufactured for sale, held in possession with intent to sell, offered or exposed for sale, or sold or delivered within this State, shall be liable to be proceeded against in the Circuit Court of the County where the same is found and seized for confiscation by writ of attachment for condemnation. Such writ shall issue upon the sworn complaint of the Commissioner or his duly authorized agent, taken by an officer authorized to administer an oath to the effect that such articles or product is adulterated or misbranded or is under standard, grade, weight or measure claimed, as the case may be within the meaning of this Article. The said sworn complaint by said Commissioner or his duly authorized agent, may be amended at any stage of the proceedings. Said writ shall be returnable in five days to

the Court issuing the writ; such Court shall hear and decide whether the allegations of the complaint are true and whether said article or product shall be condemned and confiscated. Such hearing shall not be had until five days' notice of the date therefor shall have been served on the owner, his agent, or any other party having an interest in the same, except in case defined in subhead (a). Service of a copy of the writ of attachment showing the returns of the attaching officer shall be sufficient notice for the purposes of this Section. Such writ may be executed by the Commissioner, his duly authorized agent, or by any sheriff or constable in the State. Upon the seizure of the article or product described in the affidavit, it shall be the duty of the officer or person executing the writ to return same to the Circuit Court, with his return thereon, and within five days after its return, the Court shall make up an issue between the State as Plaintiff and the property seized as defendant. (a) In the event that the owner or his agent cannot be found in this State, then said service may be perfected by posting a copy of the writ in a conspicuous place upon the premises where the goods were found and seized, and by mailing a copy thereof by registered mail to the owner, or his agent, to his last known address, and this shall be deemed to be sufficient service of the notice required by this Section. If upon the return day of such writ of attachment, the owner of the article or product, his agent or other party having an interest in same thus notified fails to appear and show cause why said goods should not be condemned, judg-

ment of condemnation and confiscation shall, upon such default, be rendered by the Court on the basis of said complaint. If such owner or agent or other party having an interest in such article or product shall on or before the return day of the writ of attachment, or upon such other day as the Court upon application of such party may determine, shall file an answer upon oath denying the allegations of adulteration, misbranding, or under standard, grade, weight or measure, as the case may be, in said complaint, the issue thus raised may be determined by the Court after hearing all the evidence offered by or in behalf of all the parties to the proceedings. Any such party may demand a jury trial of any issue of fact to be determined in the proceedings instituted hereunder, and in case a jury trial is demanded, the judgment rendered by the Court shall be in accordance with the facts as found by such jury; provided, however, that the verdict of the jury may be set aside by the Court where manifestly contrary to the evidence of law. If a judgment of condemnation and confiscation is rendered against such article or product as being adulterated, misbranded, or under standard, grade, weight or measure, within the meaning of this Article, the same shall be disposed of by destruction or sale, as the Court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Agricultural Fund, but such goods shall not be sold contrary to the provisions of this Article; provided, however, that upon the payment of the costs of such attachment proceedings and the execution and delivery of a good

and sufficient bond to the effect that such article shall not be sold or otherwise disposed of contrary to the provisions of this article, the Court may be ordered direct that such article or product shall be delivered to the owner thereof.

**REMARKS OF SENATOR SPOONER—APRIL 3, 1902—CONGRESSIONAL RECORD, FIFTY - SEVENTH CONGRESS—VOLUME 35, PART 4, PAGE 3604**

"I repeat today what I said the other day, that a business that comes before Congress with the statement that its life depends upon being permitted to violate the laws of 32 States with comparative immunity, and to unrestrainedly put upon the market an article which looks and tastes and smells like something which it is not, is not much entitled to consideration.

Does the bill interfere or invade in any way the rights of the States? Of course, a State must not be permitted to say what article subject to Federal taxation can be taxed in a State. Does this invade in any way the sovereignty of a State? Does it do so any more than in the case of the Federal liquor tax? The Congress taxes liquor made in Wisconsin. The State of Wisconsin has the power, the Supreme Court says, to prohibit its manufacture within its boundaries. Of course, in that event there would be no tax to be collected from it. So as to oleomargarine. The States, under this law, may prohibit its manufacture

colored in the similitude of butter; but if they permit its manufacture colored in the similitude of butter they cannot exempt it from the tax imposed by Congress. ***

I want further to say, Mr. President, that *this bill does not in any way shackle a State. It is a concession to the States, as has been generally understood, because up to this time, I believe, it has been generally regarded, that the original package doctrine has been held to be applicable to this product when it is imported into the States, and that the States have no power, therefore, to regulate it or to interfere with it until the original package is broken. I am not at all certain that that is good law, but it has been so regarded. But under the provisions of this bill that cannot be again contended, because, whether necessarily or unnecessarily, this bill applies to oleomargarine the provisions similar to the Wilson law.*

**FORM USED IN SEIZURE IN THIS CASE**

AFFIDAVIT FOR WRIT OF ATTACHMENT FOR CONDEMNATION:

(as provided in Section 218, of the Agricultural Code of Alabama of 1927)

STATE OF ALABAMA

COUNTY OF JEFFERSON

Before me Richard V. Evans, (CIRCUIT JUDGE) of the County of Jefferson, in Alabama,

personally appeared E. F. Cottier, who being duly sworn, deposes and says, (1) that he is a duly authorized agent of the Commissioner of Agriculture and Industries of this State, (2) that there is located on the premises of Birmingham Ice and Cold Storage Co., Birmingham, Ala., certain packing butter described as follows, to wit:

10-55 gallon steel drums containing 3,991 pounds of packing stock butter represented by sample Nos. 61 C-K thru 70 C-K incl.

(To credit of Cloverleaf Butter Co., Birmingham, Ala.)

which, affiant, E. F. Cottier has probable cause to believe, and does believe, is manufactured for sale, or held in possession with intent to sell, or offered, or exposed for sale, or sold, or delivered within this State, and on the 21 day of June, 1939 was held in possession by a person within the State of Alabama who manufactures, sells, keeps for sale, offers or exposes for sale, serves, distributes or delivers the same; and which, affiant, E. F. Cottier, has probable cause to believe, and does believe, is adulterated within the meaning of the provisions of the Agricultural Code of 1927, and amendments thereto, in the following particular to wit:

said butter is adulterated in that it consists in whole or in part of a filthy animal substance.

namely, butter which contains maggots, flies, fly fragments, rodent hairs and other extraneous matter

contrary to law and against the peace and dignity of the State of Alabama; and (3) that such butter should be seized and forfeited to the State.

E. F. Cottier
Name of Party making Affidavit

Sworn to and subscribed before me this the 21 day of August 1940

Richard V. Evans, Circuit Judge
Name and Style of Officer taking Affidavit

## REGULATIONS NO. 9

RELATING TO

## TAXES ON OLEOMARGARINE, ADULTERATED BUTTER, AND PROCESS OR RENOVATED BUTTER

---

### Chapter I

### *PLAN OF REGULATIONS*

These regulations deal with a number of statutes imposing taxes on three different commodities—oleomargarine, adulterated butter, and process or

renovated butter; also special taxes on persons manufacturing or selling such commodities.

So far as practicable the subject matter is divided first according to the commodities, and second according to the special-tax payers involved, the general plan being to bring the matter involving a given commodity or taxpayer under one head.

To avoid repetition much matter applicable to all three commodities has been incorporated as pertaining to oleomargarine, or one or more of the special taxes relating to oleomargarine. Its application to the other commodities or special taxes is shown by cross reference.

If any situation involving a particular tax is dealt with in connection with that tax, it should not be concluded that the regulations throw no light on the subject. If no cross reference is found, the index should be consulted and inquiry directed to other taxes which might involve the same situation.

*Provisions of the statutes upon which the various articles of the regulations are based generally have not been repeated in the articles. Therefore the statutory excerpts preceding the several articles should be examined to obtain complete information.*

## Chapter XII

## *PROCESS OR RENOVATED BUTTER*

### *Definition*

Art. 120. *Definition applied.*—(1) The terms "process butter" and "renovated butter" are used synonymously in these regulations and it is immaterial, for the purposes of the Acts cited herein, whether a manufacturer designates the product "process butter" or "renovated butter".

(2) Butter which falls within the definition of adulterated butter (see article 101) is subject to tax as adulterated butter rather than as process or renovated butter. The principal difference between adulterated butter and process or renovated butter is with respect to the use of chemicals or other substances. Butter reworked with the use of chemicals or other substances is adulterated. Butter which is melted, clarified, or refined without the use of chemicals or other substances is process or renovated butter.

(3) Ladled butter is taxable as process or renovat butter if, in addition to being reworked, it is melted, clarified, or refined. By the term "ladled butter" is meant butter reworked by mixing or stirring, usually for the purpose of obtaining uniformity of color, and not melted, and softened no more than necessary to facilitate mixing or stirring. Pro-

vided the butter is not melted, cleansing of ladled butter by washing with water or otherwise than by use of chemicals or other substances will not give the butter the status of process or renovated butter or adulterated butter. "Melted" as herein used means such melting as is distinguishable by the Waterhouse test.

For definitions of "butter" and "adulterated butter" see section 1, Act of August 2, 1886, and section 4, Act of May 9, 1902, respectively.

Art. 121. *Commodity tax.*—The tax on process or renovated butter accrues upon manufacturer or sale or removal from the place of manufacture. The tax shall be paid by the manufacturer by affixing stamps to the packages before they are removed from the bonded premises. If, however, the Commissioner deems it necessary, he may require the attachment of stamps, or may assess a tax, at any time after manufacture. A fraction of a pound is taxable as a pound.

The law makes no provision for exporting process or renovated butter free of tax.

Art. 122. *Manufacturers' special-tax liability.*—A manufacturer shall make return on Form 11 to the collector, pay special tax, and comply with the provisions contained in Chapter VII, relating to special taxes. As to execution of returns, see article 93.

Art. 123. *Administrative requirements.* — (*a*) *Provisions applicable.* — The provisions of these regulations as to oleomargarine manufacturers' notices (article 22), inventories (article 23), records (article 24), returns (article 25), factories (article 26), bonds (article 27), sales by legal process (article 99), and all other provisions of these regulations relating to oleomargarine, so far as applicable, are hereby extended and made to apply to process or renovated butter.

(*b*) *Penal sum of bond.*—The penal sum of the bond required of a manufacturer of process or renovated butter shall be not less than $500.

Art. 124. *Packages.*—(*a*) *Bulk containers.*—Manufacturers shall pack process or renovated butter in firkins, tubs, or other wooden, fiber, or paper containers. Except when packed for export (see article 131), packages shall not be incased in jute, burlap, or other heavy wrapping.

(*b*) *Empty containers.*—When any tax-paid packages of process or renovated butter are emptied, the stamps must be destroyed as provided in section 13, Act of August 2, 1886, relating to oleomargarine.

(*c*) *Prints and rolls.*—Manufacturers may pack process or renovated butter in prints or rolls and place them in paper cartons or wrappers, or con-

tainers of tin or similar material, sealed hermetically or otherwise, provided the coverings are branded as provided in article 128(*b*).

Art. 125. *Caution notice.*—Before removal from the factory each statutory package of process or renovated butter must have legibly and conspicuously printed or labeled on it the following notice, which must measure not less than 3 inches long by 1½ inches wide:

FACTORY NO. ..... DISTRICT, STATE OF .....

NOTICE.—The manufacturer of the renovated butter herein contained has complied with all the requirements of the law and regulations authorized thereby. Every person is cautioned not to use again either this package for renovated butter or tax stamp thereon or to remove the contents of this package without destroying said stamp, under penalty provided by law in such cases.

Art. 126. *Stamping packages.*—Stamps for the payment of the tax on process or renovated butter are designated "Process Butter" and are issued in sheets of 20 stamps each, in denominations of 10, 20, 30, 40, 50, 60, and 100 pounds. One-pound coupon stamps for use in connection with stamps of the foregoing denominations are issued in sheets of 200 stamps each.

The provisions of article 31 as to ordering, affixing, and canceling stamps, and article 32 as to repacking and restamping oleomargarine, so far as applicable, are hereby extended and made to apply to process or renovated butter.

Art. 127. *Wholesale dealers.*—(*a*) *Definition.*—Every person selling process or renovated butter in quantities of 10 pounds or more at one time (not including manufacturers selling only at the registered place of business) is a wholesale dealer in process or renovated butter.

(*b*) *Dealers exempt from liability.*—A person who sells process or renovated butter is not subject to special tax unless he is a manufacturer of the product.

(*c*) *Records and returns.*—Wholesale dealers in process or renovated butter shall keep records and render returns corresponding to those required of wholesale dealers in oleomargarine by articles 42 and 43, respectively.

(*d*) *Other administrative provisions.*—All articles of these regulations relating to wholesale dealers are hereby made to apply, so far as applicable, to wholesale dealers in process or renovated butter.

Art. 128. *Branding.*—(*a*) *Statutory packages.*—Before removal from the factory each package of process or renovated butter shall have legibly printed or stenciled on one of its sides the legend "Process Butter" or "Renovated Butter"; also the factory number, district, and State, and the net weight, in following manner:

PROCESS BUTTER
Factory No. 2, 2d Dist., New York
Net Weight, 60 lbs.

The legend "Process Butter" or "Renovated Butter" shall be in bold-face gothic letters not less than three-quarters of an inch square and the other words and figures not less than half an inch square. The color of the legend shall be in strong contrast to that of the package.

(*b*) *Cartons and wrappers.*—(1) The wrappers, cartons, or other containers in which prints or rolls are placed shalls be branded with the legend "process Butter" or "Renovated Butter", in bold-face gothic letters, not less than three-eighths of an inch square. Such legend shall form a strong contrast to the color of the wrapper or container. No other marks shall be made on the side of the wrapper or container on which the legend is placed.

(2) Each package must show the manufacturer's name and address or the factory number, district, and State, and bear a plain and conspicuous statement of the net weight of contents. Such wrappers, cartons, or other containers shall bear no pictorial or other representation which may create the impression that the article is butter as defined by the Act of Congress of March 4, 1923. (See article 100 (2).)

(*c*) *Surface impression.*—The top surface of solid-packed goods shall be imprinted with the legend "Process Butter" or "Renovated Butter", in plain gothic letters not less than half an inch square, and

impressed at least an eighth of an inch deep. Prints and rolls shall be similarly impressed with letters not less than three-eighths of an inch square. The surface impression may be omitted from prints and rolls of less than a pound unit weight, provided there is compliance with all other requirements.

(*d*) *Brands requiring approval.*—With the exception of shipping marks, any marks, brands, or labels, other than those prescribed by these regulations, shall be approved by the Secretary of Agriculture before they are used on packages of process or renovated butter.

(*e*) *Evidence of approval.*—Approved copies of all marks, brands, or labels shall be retained at the manufacturer's registered place of business, available for inspection by representatives of the Department of Agriculture.

(*f*) *Penalty for omitting or removing brand.*—Every manufacturer of process or renovated butter who fails to brand the product and the containers in which it is packed, is punishable by a fine of not less than $50 nor more than $500 or by imprisonment for not less than one month nor more than six months, or both. Every person who removes any such brands from any package of process or renovated butter is punishable by a fine not exceeding $1,000 or imprisonment not exceeding one year, or both, as provided in section 4, Act of March 3, 1891, made applicable by section 5, Act of May 9, 1902.

Art. 129. *Misbranding under Food and Drugs Act.*—Misbranding any article of food intended for interstate commerce, or manufactured or offered for sale in any Territory of the United States or the District of Columbia, is prohibited. That for the purposes of this Act an article shall also be deemed to be misbranded:

In the case of food—

(1) If it be an imitation of, or offered for sale under the distinctive name, of another article.

(2) If it be labeled or branded so as to deceive or mislead the purchaser, or purports to be a foreign product when not so, or if the contents of the package, as originally put up, shall have been removed in whole or in part and other contents shall have been placed in such package.

(3) If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, or numerical count.

(4) If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular.

No provision of these regulations shall be construed so as to relieve any person from compliance with the Federal Food and Drugs Act.

Art. 130. *Factory inspection.*—(*a*) *Authority to inspect.*—Inspectors of the Department of Agriculture, are authorized to enter all factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market, for the purpose of examination or inspection authorized by this Act.

(*b*) *Report of condition.*—Periodic inspection of each factory shall be made by such inspectors who will submit a complete report to the Secretary of Agriculture on the sanitation of the premises, the character and condition of the materials used, and the quantity and quality of process or renovated butter produced. The sanitary provisions of the meat inspection Act shall apply to the sanitary inspection of process or renovated butter factories. (See Act of August 10, 1912 (37 Stat., 273).)

(*c*) *Impure ingredients.*—Process or renovated butter containing any filthy, decomposed, or putrid animal or vegetable substance shall be deemed adulterated under the Food and Drugs Act.

(*d*) *Deleterious products seizable.*—The Secretary of Agriculture will determine whether or not materials being used in the manufacture of process

or renovated butter will be deleterious to health or unwholesome in the finished product. If any materials which have been so determined to be deleterious to health or unwholesome in the finished product are found to be present in any process or renovated butter, intended for, or in course of, exportation or shipment in interstate commerce, such process or renovated butter will be confiscated.

Art. 131. *Exportation requirements.*—(*a*) *Stamping, branding, covering.*—Original packages of process or renovated butter for export shall be stamped and branded as in the case of packages for domestic use (see articles 126 and 128) and may be covered with cloth, jute, or burlap. The outer covering shall be conspicuously stenciled with the legend "Process Butter" or "Renovated Butter", in bold-face gothic letters not less than an inch square, and the words "For Export only" on the line beneath, in similar letters not less than three-eighths of an inch square.

(*b*) *Inspection.*—Process or renovated butter for export shall be examined by inspectors of the Department of Agriculture, who will issue a certificate as to its purity, quality, and grade and the sufficiency of the stamps and brands. If inspection is not made before the outer coverings are placed upon the packages, the exporter may be required to remove them.

Art. 132. *Reports of violations.*—(*a*) *By agricultural inspectors.*—Inspectors of the Department of Agriculture who find on the market process or ren-

ovated butter, or butter suspected of being processed, renovated, or adulterated, without the required tax stamps and caution notice, will report the matter to the nearest internal-revenue officer. If in doubt as to the character of the product, the inspector should forward samples to the Laboratory Division, Treasury Department, Washington, D. C., for analysis, as provided in article 13(*a*).

(*b*) *By revenue officers.*—Internal-revenue officers who discover on the market process or renovated butter which does not comply with these regulations will promptly notify the Chief of the Bureau of Dairy Industry, Department of Agriculture, Washington, D. C., as to their findings.

Art. 133. *Authority for regulations.*—The foregoing regulations relating to process or renovated butter are dual in their scope. The provisions pertaining to internal-revenue matters are under the jurisdiction of the Secretary of the Treasury and those relating to inspection are under the control of the Secretary of Agriculture. The regulations pertaining to internal-revenue matters are made under the authority of section 321, R. S., cited above.

Art. 134. *Administrative jurisdiction.*—The administration of articles 120 to 127 of these regulations, as to process or renovated butter, is under the Commissioner of Internal Revenue, Treasury Department, and the administration of articles 128 to 131 is under the Chief of the Bureau of Animal In-

dustry, Department of Agriculture, Washington, D. C. Correspondence pertaining to the subject matter of the respective articles should be addressed to the bureau having jurisdiction in the matter.

Art. 135. *Promulgation of regulations.*—In accordance with the authority granted by the law, the foregoing regulations relating to process or renovated butter are hereby promulgated.

GUY T. HELVERING,
*Commissioner of Internal Revenue.*

Approved as to Treasury Department.

WAYNE C. TAYLOR,
*Acting Secretary of the Treasury.*

Approved as to Department of Agriculture.

H. A. WALLACE,
*Secretary of Agriculture.*

FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 12 1941
CHARLES ELMORE CROPLEY
CLERK

# In The
# Supreme Court of the United States

**OCTOBER TERM, 1941**

---

NO. 28

---

CLOVERLEAF BUTTER COMPANY,
A CORPORATION,

*Petitioner,*

*vs.*

HAYGOOD PATERSON, as Commissioner of Agriculture & Industries of the State of Alabama, et. al.,

*Respondents.*

---

## SUPPLEMENTAL BRIEF FOR RESPONDENTS

THOMAS S. LAWSON,
*Attorney General of Alabama*

WILLIAM H. LOEB,
*Assistant Attorney General*

*Counsel for Respondents.*

# INDEX

## SUBJECT INDEX


| | Page |
|---|---|
| Supplemental Argument | 1 |
| Appendix A | |
| Letter from Mastin G. White, Solicitor, U. S. Department of Agriculture | 5 |
| Appendix B | |
| Opinion No. 9860 of Solicitor of U. S. Department of Agriculture, dated December 6, 1920 | 7 |

## TABLE OF CASES CITED

Page

*Helvering v. Wilshire Oil Co.*,
308 U. S. 90, 99, 100 ..... 3

*Johnson v. Manhattan R. Co.*,
289 U. S. 479, 500 ..... 3

*Mintz v. Baldwin*,
289 U. S. 346, 351 ..... 2

*U. S. v. Dakota-Montana Oil Co.*,
288 U. S. 459, 466 ..... 3

# In The
# Supreme Court of the United States

**OCTOBER TERM, 1941**

---

NO. 28

---

CLOVERLEAF BUTTER COMPANY,
A CORPORATION,

*Petitioner,*

*vs.*

HAYGOOD PATERSON, as Commissioner of Agriculture & Industries of the State of Alabama, et. al.,

*Respondents.*

---

## SUPPLEMENTAL BRIEF FOR RESPONDENTS

---

### SUPPLEMENTAL ARGUMENT

Since the preparation and filing of the original brief for respondents in this cause, there has come to our attention Opinion No. 9860 of the Solicitor of the United States Department of Agriculture, dated December 6, 1920, regarding the scope and effect of the Renovated Butter Act of 1902 (32 Stat. 196), as amended by the act of August 10, 1912 (37 Stat. 273).

In view of the clearly expressed opinion of this Court that "much weight is to be given to the practical interpretation of the Act by the Federal Department", we feel that this opinion of the Solicitor of the United States Department of Agriculture, (the Department upon which is imposed, in part, the duty of administering the Renovated Butter Law) is of such importance to a decision of the matters here presented as to warrant its being specially called to the attention of this Court.

We have copied the opinion at length into Appendix B (pp. 7-18) and the Court is respectfully referred thereto. Also set forth in Appendix A (pp 5, 6) is a copy of a letter dated November 6, 1941, received from Hon. Mastin G. White, Solicitor of The United States Department of Agriculture, in which is stated that the solicitor knows of "no later opinion by this office holding a contrary view."

The Solicitor's opinion supports in full the conclusion reached by the respondents that the Renovated Butter Act of 1902 and its complementary statutes are so restricted in scope and effect as to preclude every inference of supersedure of state action. The following conclusions reached by the Solicitor in 1920 will suffice to illustrate the tenor of the opinion:

"In fact, the only effective control over these factories which is given to the Secretary of Agriculture is to require the marking of the product so as to identify it as process or renovated butter, and to confiscate such quantities of the finished product of the factories as may be found to be deleterious to health or unwholesome. And the only control given the Commissioner of Internal Revenue is such as is necessary for the collection of the factory, and per pound taxes provided by the acts hereinbefore referred to."

We respectfully submit that this administrative ruling, uniformly followed since its rendition, finds legislative approval in the reenactment, on February 10, 1939 (53 Stat. 254; 26 Internal Revenue Code 2325) of the statutory provision to which it related.

Upon this additional authority, we respectfully reiterate that neither Alabama's law nor the actions of Alabama's officers "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Upon this additional authority, also, do we renew our respectful insistence that the courts below correctly decided the

---

[1] *U. S. v. Dakota-Montana Oil Co.*, 288 U. S. 459, 466
*Johnson v. Manhattan R. Co.*, 289 U. S. 479, 500

issues and properly denied the injunction sought by petitioner.

Respectfully submitted,

THOS. S. LAWSON,
*Attorney General of Alabama.*

WILLIAM H. LOEB,
*Assistant Attorney General.*

# APPENDIX A

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SOLICITOR
WASHINGTON, D. C.

Nov. 6, 1941.

Hon. Thomas S. Lawson
Attorney General, State of Alabama
Montgomery, Alabama

Attention: Mr. William H. Loeb
Assistant Attorney General

Dear Mr. Lawson:

This is in reply to your letter of October 27, 1941, addressed to Mr. Leonard Calhoun, Acting General Counsel, Federal Security Agency, a copy of which letter was referred to this office for reply, concerning Section 5 of the Act of May 9, 1902 (32 Stat. 196), as reenacted on February 10, 1939 (53 Stat. 254; 26 Internal Revenue Code 2325), known as the Process or Renovated Butter Act, and the Act of August 10, 1912 (37 Stat. 269, 273), as to its application in the enforcement of the Process or Renovated Butter Act.

A copy of Solicitor's Opinion No. 9860, dated December 6, 1920, regarding the effect of the Act of

August 10, 1912, upon the enforcement of the Process or Renovated Butter Act, is enclosed as requested in your letter. *I know of no later opinion by this office holding a contrary view.*

Sincerely yours,

(Signed) MASTIN G. WHITE,
Solicitor.

Enclosure

# APPENDIX B

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SOLICITOR
WASHINGTON, D. C.

Dec. 6, 1920.

BUREAU OF ANIMAL INDUSTRY:

Reference is made to the attached file, which is returned herewith, consisting of a letter dated August 9, 1920, to Mr. Charles M. Shank, the proprietor of a renovated butter factory at Middletown, Md., and a proposed letter to the same person, dated September 30, 1920, making recommendations for the improvement of the sanitary conditions of such factory. The sixth paragraph of the last named letter states:

> Another inspection will be made about the first of November, and unless your plant has been put into a satisfactory condition, a recommendation will be made to cancel your license, and a request be made that it not be renewed until such time as the plant meets the sanitary requirements of the law.

You are advised that process or renovated butter factories are not required to, and do not, in fact, operate under any license, either from the Secretary

of Agriculture or the Commissioner of Internal Revenue, but are merely required to pay a special tax, the payment of which authorizes the operation of the factory as a matter of right. Therefore, neither the Secretary of Agriculture nor the Commissioner of Internal Revenue could revoke the license of this factory, as suggested in your letter.

To determine whether there may not be some method of proceeding whereby the practices and conditions described in your letter may be abated or, in case of their continuance, the product of such factories be denied entry into interstate commerce, I have made a careful examination of the various Acts of Congress and decisions of the courts relating to the conduct of these factories, which acts and decisions, insofar as they are pertinent to this inquiry, are discussed below.

The basic enactment providing for sanitary regulation of these factories appears to be the Act of May 9, 1902 (32 Stat., 196), by the fifth section of which it is provided:

> And the Secretary of Agriculture is hereby authorized and required to cause a rigid sanitary inspection to be made, at such times as he may deem proper or necessary, of all factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market, and of the products thereof and materials going into the manufacture of the same. * * * The Secre-

tary of Agriculture shall make all needful regulations for carrying this section into effect, and shall cause to be ascertained and reported from time to time the quantity and quality of process or renovated butter manufactured, and the character and the condition of the material from which it is made. And he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product. And in case such deleterious or unwholesome materials are found to be used in a product intended for exportation or shipment into other States or in course of exportation or shipment he shall have power to confiscate the same. Any person, firm or corporation violating any of the provisions of this section shall be deemed guilty of a misdemeanor, etc.

This section also applies to process or renovated butter factories all parts of the Act of August 30, 1890 (26 Stat. 414), and of the Act of March 3, 1891 (26 Stat. 1089) and the amendment thereto of March 2, 1895 (28 Stat. 731), which are applicable to the subjects and purposes described in the said section. But, inasmuch as the acts and amendments above referred to relate only to the ante mortem examination of certain meat animals intended for slaughter, it would appear that there are, in reality, no parts of these acts, or any of them, which can be applied to process or renovated butter or the manufacture of the same. In other words, the acts and

amendments referred to contain no provisions for the sanitary inspection of the places of slaughter of the animals described in said acts, nor of the places of manufacture of the meat products of such animals.

It is true that the fifth section of the Act of May 9, 1902, as above quoted, provides:

> Any person, firm or corporation violating any of the provisions of this section shall be deemed guilty of a misdemeanor, etc;

But this section requires nothing other than the placing of identification marks upon packages containing the finished product, to be done, or refrained from by any person engaged in the manufacture of process or renovated butter, so it would seem that none of the sanitary provisions of the act can be violated by such persons.

To supply the deficiencies of the laws relating to this subject, it was provided by the Act of Congress of August 10, 1912, Chapter 284 (37 Stat. 273):

> That the sanitary provisions for slaughtering, meat canning or similar establishments, as set forth in the Act of June 30, 1906 (34 Stat. 676) are hereby extended to cover renovated butter factories as defined in the Act of May 9, 1902 (34 Stat. 196) under such regulations as the Secretary of Agriculture may prescribe.

The sanitary provisions of the Act of June 30, 1906 (34 Stat. 676), known as the Meat Inspection Amendment, in so far as they relate to the conduct of factories in which any product is prepared, are contained in Section 6 of that Act, which provides:

> The Secretary of Agriculture shall cause to be made, by experts in sanitation or by other competent inspectors, such inspection of all slaughtering, meat canning, salting, rendering, or similar establishments in which cattle, sheep, swine, and goats are slaughtered and the meat and meat food products thereof are prepared for interstate or foreign commerce as may be necessary to inform himself concerning the sanitary conditions of the same, and to prescribe rules and regulations of sanitation under which such establishments shall be maintained; and where the sanitary conditions of any such establishment are such that the meat or meat food products are rendered unclean, unsound, unhealthful, unwholesome, or otherwise unfit for human food, he shall refuse to allow said meat or meat food products to be labeled, marked, stamped, or tagged as "Inspected and Passed".

and in Section 19 of the same act, which, in so far as it is germane to this inquiry, provides:

> That the Secretary of Agriculture shall appoint from time to time inspectors to make examination and inspection * * * of the sanitary con-

ditions of all establishments in which such meat and meat food products hereinbefore described are prepared; and said inspectors shall refuse to stamp, mark, tag, or label any carcass or any part thereof, or any meat food product therefrom, prepared in any establishment hereinbefore mentioned, until the same shall have actually been inspected and found * * * to have been prepared under proper sanitary conditions, hereinbefore provided for.

It is provided by Section 8 of the Meat Inspection Amendment that:

No person, firm, or corporation shall transport or offer for transportation, and no carrier of interstate or foreign commerce shall transport or receive for transportation from one State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to any place under the jurisdiction of the United States, or to any foreign country, any carcasses or parts thereof, meat, or meat food products thereof which have not been inspected, examined, and marked as "Inspected and Passed," in accordance with the terms of this act and with the rules and regulations prescribed by the Secretary of Agriculture.

It appears, therefore, that under the sanitary provisions of the Meat Inspection Amendment, in so far as they relate to factories and the conduct thereof, the only penalty provided for violation of the sani-

tary requirements is that the products of such factories can not be marked "Inspected and Passed" and, being so unmarked, they can not, under Section 6 of the Act, be lawfully transported, or offered for transportation in interstate commerce.

It would seem, therefore, that, under the Meat Inspection Amendment, the violation of law consists in transporting, or offering for transportation in interstate commerce meats or meat food products which have not been marked as "Inspected and Passed," rather than in preparing or producing such meats or products in an insanitary factory.

Now, reading into the Renovated Butter Act (32 Stat. 196) the sanitary provisions of the Meat Inspection Amendment (34 Stat. 676), it will be seen that the penalty provided in cases of the manufacture of process or renovated butter in insanitary factories is that the product of such factories shall not bear the Federal "Inspected and Passed" legend but, as such butter is not required to be so marked as a condition to being transported, or offered for transportation in interstate commerce, the penalty would seem to be entirely abortive as a means of regulating these factories.

It may be argued, of course, that the purpose of Congress in enacting the Act of May 9, 1902 (32 Stat. 196) was to bar from interstate commerce the products of insanitary renovated butter factories, using the machinery of the Meat Inspection Amend-

ment for that purpose, and that, therefore, these several acts, considered as one, prohibit the transportation, or offering for transportation lawfully in interstate commerce of the products of such factories, and subject any person so doing to the penalty prescribed by Section 18 of the Meat Inspection Amendment. In my opinion, the fault in this argument lies in that criminal statutes are strictly construed and can not be built up upon inference and conjecture, though, in a proper case, separate and distinct statutes may be construed together; provided that, when so taken together, they distinctly and clearly prohibit, and render unlawful the performance, or omission of some certain and particular act.

It is, therefore, my opinion that, while Congress has laid upon the Secretary of Agriculture the duty of causing sanitary inspections to be made of process or renovated butter factories, yet, for the reasons hereinbefore stated, it has not vested him with the power of enforcing a compliance on the part of the proprietors of such factories with such recommendations or regulations as he may make, or cause to be made for the better sanitation of the same.

It is true that the fifth section of the Act of May 9, 1902, known as the Renovated Butter Act, provides that:

> All process or renovated butter and the packages containing the same shall be marked with the words "Renovated Butter" or "Process But-

> ter" and by such other marks, labels, or words and in such manner as may be prescribed by the Secretary of Agriculture and no process or renovated butter shall be shipped or transported from its place of manufacture into any other State or Territory or the District of Columbia, or to any foreign country, until it has been marked as provided in this section;

and that any person who shall violate any of the provisions of that section shall be guilty of a misdemeanor. But this provision clearly relates solely to the marking, labeling, or branding of process or renovated butter for the purpose of identifying it as such. If, for instance, the Secretary of Agriculture could require, by regulation, that, as a condition precedent to the entry into interstate commerce of any process or renovated butter, it should bear the "U. S. Inspected and Passed," or other similar legend, and then, under the Meat Inspection Amendment, deny such marking to renovated butter which had not been prepared in a sanitary factory, he would be making that criminal which had not before been a violation of law and, thereby, in effect, exercising a legislative function which belongs exclusively to Congress.

The right of prescribing and promulgating regulations given to the Secretary of Agriculture under the Renovated Butter Act and the Meat Inspection Amendment, is the right of providing in detail the machinery for carrying into effect the provisions of

the Acts and not that of, by regulation, adding new provisions thereto. *United States v. Eaton*, 144 U. S. 677-687; *United States v. Hoover*, 133 Fed. 950-952.

Also Section 4 of the Act of May 9, 1902 (32 Stat. 196) provides:

> That every manufacturer of process or renovated butter * * * shall * * * conduct his business under such surveillance of officers and agents as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation require.

But the context of this section clearly indicates that it refers to surveillance for the purpose only of collecting the tax of ¼ of a cent per pound on renovated butter, as provided by the Act, for the manufacturer is required "to file such notices, inventories and bonds, and keep such books and render such returns of material and products, and to attach such signs and to affix such numbers of his factory and conduct his business under such surveillance, etc." as the Commissioner of Internal Revenue may by regulation require; the sanitary regulation of the factory being delegated entirely to the Secretary of Agriculture. *United States v. Eaton*, 144 U. S. 677-687.

*In fact, the only effective control over these factories which is given to the Secretary of Agricul-*

*ture is to require the marking of the product so as to identify it as process or renovated butter, and to confiscate such quantities of the finished product of the factories as may be found to be deleterious to health or unwholesome. And the only control given the Commissioner of Internal Revenue is such as is necessary for the collection of the factory, and per pound taxes provided by the acts hereinbefore referred to.*

In view of the foregoing, it is my opinion that the propositions stated in the sixth paragraph of the proposed letter to Mr. Charles M. Shank cannot be carried into effect; *and that there is no way, under existing law, whereby he can be compelled to improve the sanitary condition of his factory.*

If, however, it should be found that any material used at this factory in the manufacture of renovated butter renders any part of the finished product deleterious to health or unwholesome, such product may be confiscated by the Department under the provisions of the renovated butter Act (32 Stat., 196). And, if any part of the product of this factory is found to be adulterated or misbranded in violation of the Act of Congress of June 30, 1906 (34 Stat., 768), such product, when offered for transportation in interstate commerce, may be confiscated under Section 10 of that Act, and the manufacturer would also be amenable to prosecution under Section 2 thereof.

If the product is found not to conform to the provisions of either of these Acts, it is suggested that the facts and circumstances of such violations be reported to this office for such action as may be proper.

/s/ C. W. BOYLE,
Assistant Solicitor.

Inc.

FILED
NOV 14
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

---

# No. 28

---

CLOVERLEAF BUTTER COMPANY,
*Petitioner,*

*vs.*

HAYGOOD PATERSON, AS COMMISSIONER OF AGRICULTURE AND INDUSTRIES OF THE STATE OF ALABAMA, ET AL.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

---

## APPENDIX TO BRIEF FOR RESPONDENTS.

---

(Opinions of the Solicitor of the Department of Agriculture and Related Correspondence.)

UNITED STATES DEPARTMENT OF AGRICULTURE

Office of the Solicitor

Washington, D. C.

November 13, 1941.

Hon. Thomas S. Lawson,
Attorney General of Alabama,
Willard Hotel,
Washington, D. C.

DEAR MR. LAWSON:

With further reference to your communication relative to the Departmental construction placed upon the Renovated Butter Act of 1902 and the legislation supplementary thereto, I am herewith transmitting copies of the following which I believe will be of interest to you:

Opinion of Solicitor Francis G. Caffey of August 14, 1914, to the Bureau of Animal Industry.

Solicitor's Opinion No. 13706 dated March 12, 1935, to Mr. O. E. Reed, Chief, Bureau of Dairy Industry.

Solicitor's Opinion of November 25, 1935, No. 13917, to Mr. O. E. Reed, Chief, Bureau of Dairy Industry.

Memorandum for Mr. Mastin G. White from O. E. Reed, dated October 4, 1940.

Response to Mr. Reed's memorandum of October 4, 1940, signed by Mastin G. White, Solicitor, dated October 18, 1940.

Memorandum to Mastin G. White, Solicitor for the Department of Agriculture, from Ernest Kelly, Assistant Chief of Bureau of Dairy Industry re draft of bill to amend the act of May 9, 1902, dated July 22, 1941.

Reply to Assistant Chief Ernest Kelly's memorandum of July 22, 1941, signed by C. W. Boyle, Assistant Solicitor, dated August 15, 1941.

Sincerely yours,

MASTIN G. WHITE,
*Solicitor.*

August 14, 1914.

Bureau of Animal Industry:

Receipt is acknowledged of your letter of recent date, transmitting therewith correspondence relating to the condemnation of 1700 pounds of butter oil found in the melters of renovated butter factory No. 3, District of Iowa, (C. J. Walker, Sioux City, Iowa). You ask my opinion regarding the action to be taken by the inspectors of renovated butter factories when they find materials used in the manufacture of renovated butter which are filthy, decomposed, or putrid. You ask, further, for the authority to confiscate materials used in the manufacture of renovated butter and if such confiscation can take place only when the materials have been made into renovated butter and the finished product intended for, or in the course of, shipment from one State to another.

In reply, you are advised that section 5 of the Act of March 9, 1902, provides in part:

"* * * And the Secretary of Agriculture is hereby authorized and required to cause a rigid sanitary inspection to be made, at such times as he may deem proper or necessary, of all factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market, and of the products thereof and materials going into the manufacture of the same. All process or renovated butter and the packages containing the same shall be marked with the words "Renovated Butter" or "Process Butter" and by such other marks, labels, or brands and in such manner as may be prescribed by the Secretary of Agriculture, and no process or renovated butter shall be shipped or transported from its place of manufacture into any other State or Territory or the District of Columbia, or to any foreign country, until it has been marked as provided in this section. The Secretary of Agriculture shall make all needful regulations for carrying this section into effect, and shall cause to be ascertained and reported from time to time the quantity and quality of process or renovated butter manufactured, and the character and the condition of the material from which it is made. And he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are

deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in the product intended for exportation or shipment he shall have power to confiscate the same. Any person, firm, or corporation violating any of the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars or by imprisonment not less than one month nor more than six months, or by both said punishments, in the discretion of the court."

This section authorizes the Secretary of Agriculture to ascertain whether materials used in the manufacture of renovated butter are deleterious to health. It further authorizes the Secretary in case he finds deleterious materials in the finished product to confiscate the product containing deleterious materials if such product is intended for interstate or foreign movement, or if it is found in interstate or foreign commerce. No authority is given to confiscate the unwholesome materials, consequently, inspectors have no authority to confiscate unwholesome materials which they may find in factories and intended for use in the preparation or manufacture of renovated butter. If on examination of the finished product they find that it contains materials deleterious to health and further find that such product is intended for interstate or foreign movement, then they may confiscate the product. On the other hand, if the product is not moving in interstate or foreign commerce, or is not intended for interstate or foreign movement, then such product is not subject to confiscation under the statute.

I may also add that if the renovated butter containing any filthy, decomposed, or putrid animal or vegetable substance, is being shipped from one State, Territory, District, or Insular Possession, to another, for sale, or having been transported, remains unloaded, unsold, or in original unbroken packages, it may be proceeded against in any United States District Court within the District where the same is found, and seized for condemnation by a process of libel for condemnation under Section 10 of the Food and Drugs Act.

FRANCIS G. CAFFEY,
*Solicitor.*

BMI-re.

2a

OPINION 13706.

March 12, 1935.

Mr. O. E. Reed,
Chief, Bureau of Dairy Industry.

DEAR MR. REED:

Reference is made to your memoranda of February 26, 1935, October 5, and September 18, 1934, with respect to your powers under Section 5 of the Act of May 9, 1902 (32 Stat. 194; U. S. C. Title 26, Sec. 571), and regulations issued thereunder jointly by the Secretary of the Treasury and the Secretary of Agriculture in view of the opinions of this office of August 14, 1914, January 16, 1919, and December 6, 1920.

In the opinion of this office of August 14, 1914, it was held:

> This section authorizes the Secretary of Agriculture to ascertain whether materials used in the manufacture of renovated butter are deleterious to health. It further authorizes the Secretary in case he finds deleterious materials in the finished product to confiscate the product containing deleterious materials if such product is intended for interstate or foreign movement, or if it is found in interstate or foreign commerce. No authority is given to confiscate the unwholesome materials, consequently, inspectors have no authority to confiscate unwholesome materials which they may find in factories and intended for use in the preparation or manufacture of renovated butter. If on examination of the finished product they find that it contains materials deleterious to health and further find that such product is intended for interstate or foreign movement, then they may confiscate the product. On the other hand, if the product is not moving in interstate or foreign commerce, or is not intended for interstate or foreign movement, then such product is not subject to confiscation under the statute.

I may also add that if the renovated butter containing any filthy, decomposed, or putrid animal or vegetable substance, is being shipped from one State, Territory, District, or Insular Possession, to another, for sale, or having been transported, remains unloaded, unsold, or in original un-

broken packages, it may be proceeded against in any United States District Court within the District where the same is found, and seized for condemnation by a process of libel for condemnation under Section 10 of the Food and Drugs Act.

The opinion of this office of January 16, 1919, held that if the butter was made exclusively from milk or cream or both with or without common salt and with or without additional coloring matter, such butter would not be adulterated under the Food and Drugs Act. That opinion further held that butter made from cream unfit for use because of decomposition by the use of alkali or alkali with saltpeter or one or both of these with seration was adulterated under the Food and Drugs Act.

In the opinion of this office of December 6, 1930, it was held as follows:

In fact, the only effective control over these factories which is given to the Secretary of Agriculture is to require the marking of the product so as to identify it as process or renovated butter, and to confiscate such quantities of the finished product of the factories as may be found to be deleterious to health or unwholesome. And the only control given the Commissioner of Internal Revenue is such as is necessary for the collection of the factory, and per pound taxes provided by the acts hereinbefore referred to.

If, however, it should be found that any material used at this factory in the manufacture of renovated butter renders any part of the finished product deleterious to health or unwholesome, such product may be confiscated by the Department under the provisions of the renovated butter Act (32 Stat. 196). And, if any part of the product of this factory is found to be adulterated or misbranded in violation of the Act of Congress of June 30, 1906 (34 Stat. 768), such product, when offered for transportation in interstate commerce, may be confiscated under Section 10 of that Act, and the manufacturer would also be amenable to prosecution under Section 2 thereof.

In my opinion the only power your Bureau has in the premises is:

(1) To ascertain and report from time to time the quality and quantity of process or renovated butter manufactured,

and the character and condition of the material from which such butter is made;

(2) To ascertain whether the materials used in making such butter are deleterious and unwholesome in the finished product;

(3) If such product is intended for exportation or interstate commerce or in the course of exportation or of such commerce and is deleterious or unwholesome, the finished product may be confiscated by you;

(4) If the finished product set forth in (3) contains no deleterious or unwholesome material, to require the marking of such product so as to identify it as process or renovated butter.

(5) The power to make regulations;

(6) To report facts learned under (1) for such action as may be taken under the Federal Food and Drugs Act.

Very truly yours,

SETH THOMAS,
*Solicitor.*

OPINION 13917.

November 25, 1935.

Mr. O. E. Reed,
Chief, Bureau of Dairy Industry.

DEAR MR. REED:

The delay in answering your letter of April 15, 1935, has been occasioned by the pressure of the work in this office.

The questions raised with respect to the Processed or Renovated Butter Act (Act of May 9, 1902; U. S. C. Title 26, Sec. 588), and the Dairy Products Export Act (Act of May 23, 1908; U. S. C. Title 21, Sec. 132) are as follows:

1. Is this Bureau the solely responsible administrative agency of the Department in regard to this specific law? What position should this Bureau take in its future work in administering this specific law? In other words, should

any Federal or State laws passed since the Acts of August 2, 1886, or of May 9, 1902, be held to supersede or take the place of these special Acts of Congress pertaining solely to butter?

Your Bureau is the administrative agency of this Department in charge of the enforcement of that part of the Processed or Renovated Butter Act intrusted to this Department to administer.

Any Federal statute passed since the above Act not repealing the same directly or indirectly is cumulative with it.

Any State law that conflicts with the Federal statute is invalid. If it does not so conflict it is valid as far as the Processed and Renovated Butter Act is concerned.

The position your Bureau should take in administering this Act is a matter you should determine provided you do not exceed your powers under the statute.

2. Inasmuch as the Solicitor's Office has ruled that only the finished product of such factories is amenable to the law and provided the finished product does comply with the established tests and the law, can the raw material used (in this case packing-stock butter) be seized or condemned as long as the licensed factory is operating within existing laws and complying with all regulations of both this Department and the Bureau of Internal Revenue, and is producing a satisfactory finished product? Would the case of United States v. Nine Barrels of Butter (Federal Reporter No. 241, p. 499, April 9, 1917) be a relevant case?

Under the provisions of the Federal Food and Drugs Act, seizures may be made of food or any ingredient to be used in food that is adulterated or misbranded, and is in interstate commerce and remains unloaded, unsold, or in the original unbroken package. The case of United States v. Nine Barrels of Butter, 241 Fed. 499, was instituted under Section 10 of the Federal Food and Drugs Act.

3. Can a process-butter manufacturer ship packing stock or other butter, either melted or unmelted, which is unfit for food as such, to his factory with a distinctive label attached stating that such butter is not to be sold or used as

such, but is to be renovated in a licensed factory authorized by law and operating under government supervision?

Irrespective of any labeling placed on the product if the product can be used for food or as an ingredient of food, the article is subject to the Federal Food and Drugs Act when there is that jurisdiction set forth in my answer to your second question.

4. Is a duly licensed process-butter factory, so operating, subject to State inspection and shall State or Federal inspection have the greater power when the respective regulations conflict?

Such a factory is subject to the State laws provided such laws are not in conflict with the Federal statutes. If there is such a conflict, the Federal statutes prevail.

5. Inasmuch as the Solicitor's Office has ruled (December 18, 1931) that process-butter is not butter within the legal interpretation of the law, what action, if any, can this Bureau take against a manufacturer marketing a product containing less than 80 per cent butterfat?

On March 18, 1932, this office advised you that your Bureau can insist that renovated or processed butter contain 80 per cent of milk fat if you can prove by competent witnesses that such butter should contain at least 80 per cent of milk fat.

6. Can whole milk or cream be added to the "melted, clarified or refined" butter oil and in what amounts before the melted fat is again "made to resemble genuine butter" or can only skim milk be used? (Section 118.)

Normal quantities of skim milk, whole milk, or cream can be used if they are used in the process by which butter is melted, clarified, or refined and made to resemble genuine butter, provided the product is not adulterated butter.

7. Can a process-butter manufacturer use a mechanical deodorizer in making his product (a number of such machines utilizing the vacuum principle, are commercially available) provided he does not violate Section 101 of the regulations?

This question is answered in the affirmative.

8. What action, if any, can this Bureau take against a manufacturer using butter wrappers which have not been approved by the Department and which would have been disapproved had they first been submitted to this Bureau (Section 123-d)?

A manufacturer of processed butter who ships or transports from his place of manufacture in interstate commerce, or to any foreign country, any such butter unless such butter, or its package, bears the words "Renovated Butter" or "Processed Butter", and such other marks, labels, or brands, and in such manner, as prescribed by the Secretary of Agriculture, is guilty of a misdemeanor, as provided for in Section 5 of the Act of May 9, 1902 (U. S. C. Title 26, Sec. 578).

9. Since the Act of May 23, 1908 (35 Stat. 254) (U. S. C. Title 21, Sec. 132) is considered permanent legislation (July 13, 1933 ruling) should not such a contemplated revision include specific regulations governing all dairy products intended for export? On page 3 of Bureau of Animal Industry Order No. 97 is found the following: "Notice is accordingly given that the foregoing laws and rules and regulations * * * are appropriate and applicable and will *hereafter be applied* to dairy products in general, exported or offered for export from the United States." Would this notice be considered as making the inspection and certification of dairy products for export mandatory on the Department of Agriculture through this Bureau?

The notice quoted would, if taken alone, make inspection and certification by your Bureau mandatory. However, from paragraphs 1 and 2 on the same page, it is noted that Bureau of Animal Industry Order No. 91 and Bureau of Animal Industry Order No. 94 are to remain in full force and effect.

Bureau of Animal Industry Order No. 91 provides only for inspection and marking of dairy products for export when request is made for same by owners or shippers. Bureau of Animal Industry Order No. 94 provides only for inspection from time to time of factories, packing

houses, and places where renovated butter is prepared, and sets out labels to be used on butter. If continuous inspection is to be had both regulations will have to be amended.

10. Should the proposed revised regulations be based on the Meat Inspection Law of March 4, 1907? (U. S. Code Title 21, Chapter 4, Sec. 132 provides that *Sections 71 to 94*—the Meat Inspection Law—shall be deemed to include dairy products intended for exportation to any foreign country.)

Such parts of the Meat Inspection Act of March 4, 1907 (34 Stat. 1260) as are appropriate to ascertain the purity and quality of dairy products intended for export to a foreign country may be applied by the Secretary, under rules and regulations prescribed by him in enforcing the Act of May 23, 1908, 35 Stat. 254 (U. S. C. Title 21, Sec. 132).

That paragraph of the Meat Inspection Act requiring that no clearance shall be given any vessel, etc., is also applicable. That is to say, before a vessel, having aboard dairy products for export to a foreign country, can clear, the owner or shipper of such dairy products must have a certificate issued by an inspector of this Department setting forth that the dairy products comply with the Act of May 23, 1908, 35 Stat. 254 (U. S. C. Title 21, Sec. 132).

11. Both the Processed or Renovated Butter Law of May 9, 1902 (Sec. 5) and the Act of May 23, 1908, referred to above, are based on the Acts of March 3, 1891 as amended March 2, 1895. These earlier Acts (1891 and 1895) are *superseded* by Sections 71 to 94 (the Meat Inspection Law) (U. S. C. Title 21, Historical Note p. 178 and Historical Note under Section 579 of Title 26—Internal Revenue.) If these earlier Acts (1891-1895, as well as the Act of August 30, 1890 mentioned in Section 5 of Act of May 9, 1902) were all the meat inspection laws in force previous to the enactment of the Meat Inspection Acts of 1906 and 1907, and it is true that they were all superseded by the permanent Act of 1907, then should not the regulations governing the exportation of dairy products as well as

those governing the exportation and manufacture of processed or renovated butter be based on the latter Act?

Particularly in the case of processed or renovated butter would the above seem to be substantiated by the Act of August 10, 1912 (37 Stat., 273) which "provides that the sanitary provisions for slaughtering, meat canning, or similar establishments, as set forth in the Act of June thirtieth, nineteen hundred and six (Thirty-fourth Statutes, page six hundred and seventy-six), are hereby extended to cover renovated butter factories as defined in the Act of May ninth, nineteen hundred and two (Thirty-second Statutes, page one hundred and ninety-six), under such regulations as the Secretary of Agriculture may prescribe."

It must be remembered that the Processed or Renovated Butter Act is a special Act while the Dairy Products Export Act is general. The only parts of the Meat Inspection Act that apply to the Processed or Renovated Butter Act are those which are applicable to the subjects and purposes described in the Act of May 2, 1902 (U. S. C. Title 26, Sec. 578), viz: sanitary inspection, marking and labeling, confiscation, and also clearance certificate for a vessel when the butter is to be exported to a foreign country. The powers of the Secretary, it is to be noted, are different under the Dairy Products Export Act from those under the Processed or Renovated Butter Act. Under the former, as pointed out in answer to question 10, supra, those parts of the Meat Inspection Act for inspection and certification which are appropriate for the Secretary to ascertain the purity and quality of such products, may, by regulation, be prescribed by the Secretary, and the Secretary can cause them to be marked, etc., to secure their identity and also purity, quality and grade. Also, those parts of the Meat Inspection Act which deal with the clearance of vessels having aboard dairy products for foreign countries are applicable.

12. Processed or renovated butter has not been required to bear the Federal "Inspected and Passed" legend. Is this because the earlier laws upon which the Act of 1902 were based did not require it to be so labeled, or are there other reasons why such labeling is not required?

13. If, however, this legend was not required under the earlier laws but would now be required under the Meat Inspection Law, since the latter has superseded the earlier laws and are now applicable, would it not be within the province of the Secretary of Agriculture to rule that processed or renovated butter and other dairy products intended for export should be so labeled when inspected?

14. The Secretary of Agriculture has the power to make rules and regulations and to require that such marks, labels, stamps, or other devices as he may prescribe be used under all the earlier laws (1890-1891-1895-1902 and 1908). Assuming that in accord with the greater power given him under the Meat Inspection Law (presumably supersedes the earlier Acts) and by the power given him under a decision rendered by the Supreme Court (Houston et al. v. St. Louis Independent Packinking Co., U. S. Report No. 249) he should rule that processed or renovated butter and dairy products intended for export be labeled "Inspected and Passed"; that the factories making these products be licensed, and that other sections of the Meat Inspection Regulations relative to sanitation, ingredients, or materials; labeling, etc., be more fully applied for the more efficient enforcement of the Act to these products would not such a ruling give the Department, through this Bureau, more enforcement power than can be exercised under existing rulings? Would it be possible to include such new rulings in the proposed revision of present regulations? Would the application of the Meat Inspection Law to animal oleomargarine be comparable? The Oleomargarine Law was passed (1886) before the Meat Inspection Law. (1906)

There is no provision of law or any existing regulation requiring that renovated butter should bear the legend "Inspected and Passed", and the regulations now in force and effect indirectly show that it is not the intention of the Secretary that there should be such supervision as would be necessary if such legend is to be required. If such supervision is decided upon administratively, then there must be regulations promulgated to cover the same with the limitations set forth in answers 10 and 11.

Should you decide to issue new regulations under the above Acts, I will be glad to consider them upon submission of the same.

Very truly yours,

MASTIN G. WHITE
*Solicitor.*

c. c. to F. & D. Admin.

B 54732.

UNITED STATES DEPARTMENT OF AGRICULTURE

Bureau of Dairy Industry

Washington, D. C.

October 4, 1940.

*Memorandum for Mr. Mastin G. White,*
*Solicitor for the Department.*

DEAR MR. WHITE:

The development and perfection during the past few years of new methods for analyzing and examining butter has resulted in increased regulatory activity and action against farm-made or "packing stock" butter intended for use in the manufacture of process or renovated butter. Certain State regulatory agencies and the Federal Food and Drug Administration have been particularly active.

The Bureau of Dairy Industry, which is the administrative agency designated by the Secretary of Agriculture to enforce the process or renovated butter act, is entirely sympathetic with the activities of these agencies, although the apparently limiting provisions of Section 5 of the Act of May 9, 1902 (32 Stat. 196), with which this Bureau is primarily concerned, as construed in opinions of your office, have, necessarily governed and guided this Bureau in its administrative policy in carrying out the provisions of the Act. Specifically, the opinion of August 14, 1914 relates to the condemnation by the Department of packing stock butter oil intended for use in the manufacture of process or renovated butter. This butter oil is similar in contamination to that

recently seized and condemned by above-cited agencies. This opinion and the contributing opinion of January 16, 1919, pertaining to the relationship between the process or renovated butter act, and other acts, have deterred this Bureau in its enforcement activities.

The fact that this Bureau has not taken any action paralleling that of other Federal agencies has raised the question of jurisdictional relationship between State and Federal and between general and specific laws in at least one case now pending in Court. We therefore request a reconsideration of the opinion of your office rendered August 14, 1914.

Yours very truly,

O. E. REED,
*Chief of Bureau.*

October 18, 1940.

OPINION No. 2829.

*Memorandum for Mr. O. E. Reed,*
*Chief, Bureau of Dairy Industry.*

DEAR MR. REED:

This acknowledges your memorandum of October 4, 1940, wherein you requested this office to reconsider the subject of its communication to your Bureau, dated August 14, 1914, regarding the authority of inspectors of *renovated-butter factories* to confiscate, under Section 5 of the Act of May 9, 1902 (32 Stat. 196; 26 U. S. C. 995), materials that are filthy, decomposed, or putrid, and that are intended for use in the manufacture of the product known as "renovated butter".

The contents of the communication of August 14, 1914, again have been considered. It is still our view that, although the language of the statute is not entirely clear, inspectors operating under the authority of Section 5 of the Act of May 9, 1902, can not properly confiscate materials which are intended for use in the manufacture of renovated butter but which have not, at the time of discovery, been used for such purpose. The authority to confiscate is limited

to the finished product, which can be confiscated if materials, which are deleterious to health or unwholesome in the finished product, were used in the manufacture of such product and if such product is intended for, or in the course of, interstate commerce.

Very truly yours,

MASTIN G. WHITE,
*Solicitor.*

C 33675

UNITED STATES DEPARTMENT OF AGRICULTURE

Bureau of Dairy Industry

Washington, D. C.

July 22, 1941.

To: Mastin G. White, Solicitor for the Department.

From: Ernest Kelly, Assistant Chief of Bureau.

Subject: Draft of Bill to Amend the Act of May 9, 1902 (Process or Renovated Butter Act)

Enclosed is draft of a bill prepared in this Bureau to amend the Act of May 9, 1902, commonly known as the process or renovated butter act.

The real purpose of this bill is to invest the Department with authority to inspect and to condemn ingredients intended for use in the manufacture of renovated butter if found to be unclean, filthy, putrid, decomposed, or otherwise unfit for use for the aforesaid purpose.

Under various interpretations of existing law, the Department has no authority whatever in the matter of controlling the materials which enter into the manufacture of renovated butter. In other words, if the butter, milk, butter oil, or any other ingredient entering into the manufacture of renovated butter is found to be unfit for such use, the Department is without authority of law to take any action unless unclean, filthy, putrid, or decomposed matter is found to exist in the finished product to an extent to render it deleterious to health or unwholesome.

It is axiomatic that despite the processes through which butter or butter oil pass during the course of manufacturing renovated butter, certain soluble materials unfit for human consumption cannot be removed and it is difficult if not impossible to detect them in the finished product. For example, a lot of butter may be infested with maggots and should be condemned for use in the manufacture of renovated butter. If not, in the melting process fat from these maggots will be mixed with the butterfat and the animal fat may be detected in the finished product only by chemical laboratory tests, if at all.

I shall appreciate it very much if you will give consideration to the enclosed draft and make any changes therein which you deem to be necessary. Mr. Charles S. Trimble of this Bureau will be available at almost any time to confer with the staff of your office concerning this matter.

ERNEST KELLY.

Enclosure.

Aug. 15, 1941.

*Memorandum for Mr. O. E. Reed,*
*Chief, Bureau of Dairy Industry*

DEAR MR. REED:

This is in reply to Assistant Chief Ernest Kelly's memorandum of July 22, 1941, with which a draft of a proposed bill to amend Section 5 of the Act of May 9, 1902 (32 Stat. 196), was submitted for consideration in this office.

It was stated in Mr. Kelly's memorandum that the real purpose of the proposed bill is to give the Department authority to inspect the materials from which process or renovated butter is manufactured and to condemn such materials as may be found to be unclean, unwholesome, unhealthful, or otherwise unfit for use in the manufacture of process or renovated butter.

The present statute makes no provision for an effective control over the ingredients from which process or renovated butter is manufactured. The Secretary is authorized

merely to ascertain whether materials used in its manufacture are deleterious to health or unwholesome in the finished product. It appears, therefore, that legislation such as that suggested in your letter is much needed.

The draft received with your letter has been rewritten, and the original and six white carbons of the same are attached.

Very truly yours,

C. W. Boyle,
*Assistant Solicitor.*

Attachments.

(7299)

# In The
# Supreme Court of the United States

OCTOBER TERM 1941
NO. 28

CLOVERLEAF BUTTER COMPANY,
*Petitioner.*

V.

HAYGOOD PATERSON, AS COMMISSONER OF AGRICULTURE AND INDUSTRIES OF THE STATE OF ALABAMA, ET. AL.,
*Respondents.*

## RESPONDENTS' PETITION FOR REHEARING


THOMAS S. LAWSON,
*Attorney General of Alabama*

WILLIAM H. LOEB,
*Assistant Attorney General of Alabama*

CHARLES L. ROWE,
*Assistant Attorney General of Alabama*

Judicial Building,
Montgomery, Alabama,
*Attorneys for the Respondents.*

# INDEX


Page

Petition ..... 5

Cases cited:

*Hypolite Egg Co. v. U. S.*, 220 U. S. 45, 54 ..... 12

*Gibson v. State*, 214 Ala. 38, 106 So. 231 ..... 12

Statutes cited:

Section 2325 I. R. C. ..... 6

Gen. Acts Ala. 1919, p. 1031 ..... 12

Code of Ala. 1923, Sec. 4396 ..... 12

Code of Ala. 1940, Title 2, Sec. 314 ..... 12

Appendix ..... 17

# In The
# Supreme Court of the United States

---

OCTOBER TERM 1941
NO. 28

---

CLOVERLEAF BUTTER COMPANY,
*Petitioner.*

V.

HAYGOOD PATERSON, AS COMMISSONER OF AGRICULTURE AND INDUSTRIES OF THE STATE OF ALABAMA, ET. AL.,
*Respondents.*

---

## RESPONDENTS' PETITION FOR REHEARING

---

Come the respondents, Haygood Paterson, as Commissioner of Agriculture and Industries, and George H. Marsh, as Director of the Division of Agricultural Chemistry, of the State of Alabama, and respectfully petition for a reconsideration by the Court of its judgment and order of February 2, 1942, reversing the judgment of the United States

Circuit Court of Appeals, Fifth Circuit, (116 F.(2) 227), and, as grounds therefor, they assign the following:

I.

That this Honorable Court erred in holding that Section 2325 (and related sections) of the Internal Revenue Code, and the regulations promulgated thereunder, operate to exclude the complementary and cooperative plan provided by Alabama statute for the inspection and regulation of packing-stock butter used in the manufacture in Alabama of renovated butter in interstate and intrastate commerce.

**ARGUMENT AND STATEMENT IN SUPPORT OF GROUND I.**

The effect of the Court's decision is to destroy the plan whereby Alabama authorities, State and municipal, were working together with Federal authorities to the end that the consumers of renovated butter manufactured in Alabama would not be imposed upon by the use of cheap, foul, filthy and unwholesome packing stock in the manufacture of such renovated butter. Until the Court's decision, the plan worked effectively. There was no friction between the Federal agencies and agents, on the one hand, and the State and municipal agencies and agents, on the other hand. The agents of the United States Department of Agriculture charged with the enforcement of the Renovated Butter Act who made

inspections of the manufacturing plant at Birmingham, acting under the instructions of their legal advisers, recognized that seizure and condemnation of packing-stock butter in the hands of the manufacturer (be it ever so filthy, foul and unwholecome) were beyond the power granted to them by the Congress. They made no attempt to make such seizure or condemnation. They left that phase of the supervision primarily to State and municipal agents charged with the enforcement of the State and municipal food laws and health laws, and, secondarily, to those Federal agents charged with the enforcement of the Federal Pure Food Laws.

This practical and practicable division of the phases of supervision had the effect of making it very difficult for the manufacturer to use cheap, filthy and unwholesome packing stock in the manufacture of renovated butter. The Federal agents charged with enforcement of the Renovated Butter Act made periodic visits of inspection to the manufacturing plant at Birmingham, and took samples of the finished product on almost every visit; but they only took samples of the packing stock in a few instances. During the entire year 1939, these Federal agents made visits of inspection to the manufacturing plant at Birmingham on eight (8) separate days, viz: On January 12, March 3, May 1, June 5, August 14, September 19, October 23 and December 18. During the entire year 1940 they made five (5) such visits of inspection, viz: On January 14, April 2, June 19, September 4 and August 18. And during the entire year 1941, they made six (6) such visits

of inspection, viz: January 15, February 16, April 29, July 9, August 18 and November 5. (See letter of O. E. Reed, Chief, Bureau of Dairy Industry, addressed to George H. Marsh, Director, Division of Agricultural Chemistry, dated February 16, 1942, which is set out in the appendix hereto.)

Although the letter of Mr. Reed, Chief of the United States Bureau of Dairy Industry, only covers the calendar years 1939, 1940 and 1941, a reference to the records of that agency will, we believe, disclose that the number of inspection visits to the manufacturing plant at Birmingham during those years is about average for all of the years during which Cloverleaf Butter Company has been engaged in the manufacture of renovated butter in Birmingham.

The visits made to the plant at Birmingham by these Federal agents were adequate for the enforcement of the Renovated Butter Act, as construed by each succeeding Secretary of Agriculture and Bureau Chief—that is to say, to determine if the plant was kept in a generally sanitary condition, and if manufacturing practices and processes were generally in accordance with the requirements of the Act and of the regulations, and to take occasional samples of the finished product for analyses by experts. But inspection on five, six or eight visits during the calendar year is a far cry from the "continuous surveillance" which the Court's opinion assumes is maintained by Federal agents of the materials and the processes of manufacture.

This long and unbroken administrative construction of the Renovated Butter Act by the Federal agency charged with its enforcement was completely ignored by the Court's opinion.

In view of the long continued administrative construction, we earnestly urge that the crux of the opinion, stated in the conclusion thereof,

> "Congress hardly intended the intrusion of another authority during the very preparation of a commodity subjected to the continuous surveillance and comprehensive specifications of the Department of Agriculture. To uphold the power of the State of Alabama to condemn the material in the factory while it was under Federal observation and while Federal enforcement deemed it wholesome would not only hamper the administration of the Federal Act but would be inconsistent with its requirements. Whether the sanction used to enforce the regulation is condemnation of the material or the product is not significant. Since there was Federal regulation of the materials and composition of the manufactured article, there could not be similar State regulation of the same subject."

is ill advised and is based upon unfounded and unwarranted assumption rather than upon reality.

The complementary and cooperative plan which was in effect until it was struck down by the Court's opinion, we reiterate, was workable and effective. The Federal agency charged with the enforcement of the Renovated Butter Act was not dissatisfied with the Alabama statute and with the action of the Alabama officials thereunder, for the very good reason that they operated upon and supervised a necessary phase of regulation (that is to say, seziure and condemnation of packing stock) which the Congress had not confided to it. The Federal agency charged with the enforcement of the Federal Pure Food Laws was not dissatisfied with the State statute and the State action for the very good reason that it has a long (and, we may add, "court-sanctioned") record and tradition of cooperation with State agencies in matters looking toward the protection of the public health as relates to foods and food products. The manufacturer *was dissatisfied* with the State statute and the State action for the equally good reason that, as administratively construed and as practically applied, there was an excellent opportunity afforded to circumvent the Federal laws; and that, if only the State seizure and condemnation of packing stock could be stifled successfully, the cheapest kinds and types of packing-stock butter (although foul, filthy and unwholesome) could be used in manufacturing, with little probability that the filth could be detected by the most searching microscopic examination of the finished product.

The Court's opinion will upset the long prevailing organization of the Bureau of Dairy Industry,

which had been established for the performance of its functions, as administratively construed. Instead of inspection visits to the manufacturer's plant on five, or six or eight days during the calendar year, an organization will be required to maintain a constant vigil. And the experience of Alabama officials in undertaking to enforce the Alabama statute (before restrained by this Court's opinion) has led to the conclusion that anything less than constant vigil will result in a mockery and a sham.

The Court's opinion will result in complete disruption of the long standing collaboration and cooperation by and between the Federal agency charged with the enforcement of the Federal Pure Food Laws and the Alabama officials, insofar as renovated butter is concerned.

The Court's opinion will result in thousands of unsuspecting consumers of renovated butter being imposed upon because, in many instances, it is practically an impossibility to detect filth in renovated butter which is manufactured from filthy and unwholesome packing stock.

## II.

That the Court erred in failing to consider and to apply the presumption raised by Section 314, Title 2 of the Alabama Code of 1940.

## ARGUMENT AND STATEMENT IN SUPPORT OF GROUND II.

By General Acts of Alabama, 1919, page 1031, which was codified as Section 4396 of the Alabama Code of 1923, and which was incorporated into the Alabama Code of 1940 as Title 2, Section 314, it is provided:

> "§314. What is prima facie evidence of intent to violate article.—The having in possession by any person, firm or corporation who manufactures or exposes for sale any adulterated or misbranded food within the meaning of this article, shall be prima facie evidence of having in possession with intent to sell in violation of its provisions, except that any manufacturer, wholesaler or jobber, may keep properly identified goods specially set apart in his stock for sale in other states which might otherwise be in violation of the provisions of this article."

The possession of an adulterated food product intended for use in the composition or manufacture of another food product is a use within the prohibition of a pure food statute. *Hipolite Egg. Co. v. United States*, 220 U. S. 45, 54. Cf. *Gibson v. State*, 214 Ala. 38, 106 So. 231.

The Court's opinion specifically referred to only paragraph two of the stipulation limiting the issues, and observed that that paragraph "will crystallize the essential elements of the dispute," - - - and, "as other paragraphs state variations of this controversy * * * we need not consider them further." Obviously, these observations are not accurate.

The first paragraph of the stipulation undertook to present a question based on a situation in which the raw material *only* was in interstate commerce, without reference to whether the finished product was intended for interstate or intrastate commerce.

The second paragraph of the stipulation, as appears from the context, undertook to present a question based on a situation in which both the raw materials and the finished product were in interstate commerce.

There is no allegation in the complaint that any of the packing stock seized by Alabama officials for condemnation was "properly identified and specially set apart," in the manufacturer's stock for use in manufacture of a finished product for sale in other states, and not for sale in Alabama. In the absence of averment of such "proper identification and specially setting apart" the Alabama statute intervened to raise the presumption. As a matter of fact, the complaint, in paragraph nineteen thereof, alleges

facts which show a clear disregard of the presumption statute.

We confess that the motion to dismiss the complaint admitted all facts well pleaded. But it did not admit conclusions of law alleged in the complaint.

The presumption statute was enacted to cure an evil that was widely prevalent in Alabama. Officials charged with the enforcement of the State's pure food laws continuously were confronted with claims by those found in possession of adulterated foods that they were not intended for use or sale in violation of Alabama law, but were intended for, and were being held in the course of, shipment to states where their use or sale was (allegedly) lawful. Of course, in nearly all of such cases the claims were spurious and were made to evade seizure and condemnation of the adulterated articles. But they were efficient and practicable obstacles to enforcement of the pure food laws and were, in many cases, irrefutable. This resulted in a partial breakdown of law enforcement.

Taking cognizance of this situation, the Legislature enacted the presumption statute to "plug the leak". No longer was the unsupported declaration of intention of the person in possession of adulterated foods to be effective to obstruct law enforcement. No longer was the person in possession of such adulterated foods to be permitted to comingle them with other lawful foods and, when they were intercepted

by seizure, to evade the penalty of the law by the device of interposing a spurious claim (irrefutable, as a matter of practicability) that the adulterated articles were intended for shipment to, and use in, another state whose laws allegedly did not forbid their use. More was to be required in order to establish such a claim. The person in possession was to be required to "properly identify and to specially set apart" such adulterated articles in his stock in order to avoid the prima facie presumption.

We confess that the presumption is prima facie and not absolute. But good pleading, in the situation reflected in the allegations of the complaint in this case, would require an affirmative averment that the packing stock seized in the possession of the manufacturer had been "properly identified and specially set apart" for use, when manufactured into renovated butter, in other states; or would require an affirmative averment that no part of it was intended for use in the manufacture of renovated butter for sale in Alabama.

There is no such allegation in the complaint.

Upon the complaint, the motion to dismiss and the stipulation (paragraph one) there is admitted no more than that the packing sock seized was held in possession in prima facie violation of Alabama law. Upon such a showing, the complaint was properly dismissed by the trial court.

Respondents, therefore, respectfully pray that the judgment and order of this Honorable Court reversing the judgment of the Circuit Court of Appeals, Fifth Circuit, be vacated, and that said judgment of said Circuit Court of Appeals be affirmed.

Respectfully submitted,

THOS. S. LAWSON,
*Attorney General of Alabama*

WILLIAM H. LOEB,
CHARLES L. ROWE,
*Assistant Attorneys General of Alabama*
*Attorneys for the Respondents.*

We certify that this petition is presented in good faith and not for delay.

THOS. S. LAWSON,
*Attorney General of Alabama*

WILLIAM H. LOEB,
CHARLES L. ROWE,
*Assistant Attorneys General of Alabama*
*Attorneys for the Respondents.*

## APPENDIX

### UNITED STATES DEPARTMENT OF AGRICULTURE

Bureau of Dairy Industry

Washington, D. C.

February 16, 1942

Mr. Geo. H. Marsh, Director
Division of Agricultural Chemistry
Dept. of Agriculture and Industries
515 Dexter Avenue
Montgomery, Alabama

Dear Mr. Marsh:

I have your letter of February 13 requesting information as to the number of inspections and analyses of process or renovated butter made by this Bureau of the factory and product of the Cloverleaf Butter Company, Birmingham, Alabama, during the last three years.

In 1939, inspections were made of this company's factory on January 12, March 3, May 1, June 5, August 14, September 19, October 23 and December 8; in 1940 on January 14, April 2, June 19, September 4 and October 18, and in 1941 on January 15, February 16, April 29, July 9, August 18 and

November 5. In practically every case one or more samples of finished product were taken and submitted to the Micro-Analytical Division of the Food and Drug Administration for examination as to presence of contaminating material and to our own bureau for composition analysis. Dr. F. Allen Hodges was the analyst who usually made the tests in the Food and Drug Administration and Mr. H. Haller in this Bureau. We are unable to give you the exact dates of analysis but usually samples were tested within a short time after submission to these respective analysts. In a few instances samples of packing stock butter and of centrifuge "sludge" were submitted to the Micro-Analytical Division of the Food and Drug Administration for examination.

Very truly yours,

/S/ O. E. Reed

Chief, Bureau of Dairy Industry

FILE COPY

Office-Supreme Court, U. S.
FILED
MAR 6 1942
CHARLES ELMORE CROPLEY

IN THE

# *Supreme Court of the United States*

OCTOBER TERM, 1941

No. 28

CLOVERLEAF BUTTER COMPANY,
*Petitioner.*

vs.

HAYGOOD PATTERSON, *As Commissioner of Agriculture and Industries of the State of Alabama, Et Al,*
*Respondents.*

## PETITIONER'S REPLY TO RESPONDENTS' PETITION FOR REHEARING

HORACE C. WILKINSON,
ERLE PETTUS,
VICTOR H. SMITH,
Birmingham, Alabama,
*Attorneys for Petitioner.*

## CASES CITED


| | Page |
|---|---|
| Gilchrist Drug Co. v. City of Birmingham, 234 Ala. 204 | 8 |
| Rhodes v. Iowa, 107 U. S. 412 | 4 |
| Section 2322, I. R. C. (c) | 5 |

IN THE

# *Supreme Court of the United States*

OCTOBER TERM, 1941

No. 28

CLOVERLEAF BUTTER COMPANY,
*Petitioner.*

vs.

HAYGOOD PATTERSON, *As Commissioner of Agriculture and Industries of the State of Alabama, Et Al,*
*Respondents.*

## PETITIONER'S REPLY TO RESPONDENTS' PETITION FOR REHEARING

*May It Please The Court:*

The argument and statement in support of the respondents' application for a rehearing present such palpably misleading statements and unfair use of official correspondence as that it is impossible to permit these statements to remain unchallenged.

By the Petition for a Rehearing the respondents are asking this Court to say that although Congress recognized packing stock butter as a legitimate article of interstate commerce it nevertheless intended that the State might seize such article while it was in interstate commerce because of some alleged shortcomings that Con-

gress was fully cognizant of at the time it recognized the butter as a legitimate article of commerce, and that it might be seized while those shortcomings were in process of elimination under Federal license expressly authorizing that identical operation. It may be that a contention of that kind can be suported only by misleading statements.

## MISLEADING STATEMENTS

We challenge the assertion that the Court has destroyed a plan whereby State and Federal authorities were working together to protect the consumers of renovated butter. (Respondents' brief, pages 6 and 7.)

We challenge the charge that there was any complementary and cooperative plan in effect that was struck down by the Court's opinion. The truth of the matter is that in order to settle the authority to seize packing stock butter in interstate commerce the Secretary of Agriculture strongly recommended a bill that is now pending in Congress which would exclude State and local inspection of packing stock butter. Instead of any plan to cooperate with the State in the same field in interstate commerce the Secretary of Agriculture seeks to exclude from this field by express legislation.

The Secretary of Agriculture has always recognized the desirability to the public and to manufacturers of uniform legislation and regulations on the subject. We are cooperating with the Secretary of Agriculture along that line.

The respondents make liberal use of such adjectives as "foul", "filthy", "cheap" and "unwholesome" in con-

nection with their reference to packing stock butter. They are careful to refrain from intimating that the finished product is in any wise unwholesome whatever the condition of the raw material used in its manufacture might have been. The respondents go further. They set out a letter in the Appendix from the United States Department of Agriculture listing numerous inspections of the Cloverleaf Butter Company's plant and numerous inspections and examinations of its finished product, but there is no intimation that the most severe critic the micro-analytical division of the Food and Drug Administration has ever suggested the presence of anything objectionable in the finished product.

The Secretary of Agriculture did not leave the seizure of packing stock butter to State and municipal agents because of any plan as the respondents imply. He is not content now to leave the seizure of packing stock butter to State and municipal agents but is attempting to obtain express legislative authority to seize packing stock butter that he deems unfit for renovation.

In the Renovated Butter Law Congress made a common-sense decision when it decided to make the condition of the finished product the criterion for determining whether the raw material going into its manufacture was suitable. That was a legislative regulation of commerce. The Solicitor's Department construed the Act but there is no suggestion in any construction of the Act or in any part of this record of any plan to leave seizure of packing stock butter to the States. The

action of the Secretary of Agriculture negatives any such idea.

The Cloverleaf Butter Company has operated for more than 20 years under Federal license. Other plants in other localities have similarly operated over a long period of time. Not until these Alabama officers misconceived their authority and atempted to usurp power has it ever been suggested, so far as we are able to find, that a State might interfere with the production of renovated butter in interstate commerce used in its manufacture. No State attempted any such thing and no State other than Alabama is atempting any such thing at the present time.

As we understand the decisions of this Court in *Rhodes v. Iowa*, 107 U. S. 412, and similar cases, it is the policy of the Court that the interstate transit of recognized articles of commerce not be interferred with until such transit has been completed, although the states may afterwards take such action in respect to such articles to be used, consumed or sold within their borders as their policy may require.

If there is any merit in the respondents' position then those States that are satisfied to allow sub-standard packing stock butter to be renovated will profit and the manufacturers in those States enrich themselves at the expense of the Cloverleaf Butter Company.

Under the respondents' interpretation of the Alabama Statute no packing stock butter can be found that will measure up to the standard they may insist upon and it is doubtful whether any butter on earth meets their requirements.

## MR. REED'S LETER

Respondents set out a letter from Mr. Reed in the Appendix which they say challenges the accuracy of the statement in the opinion that the commodity is subjected to the continuous surveillance and comprehensive specifications of the Department of Agriculture. They claim that this letter shows five, six or eight visits during a calendar year which they assert is a far cry from the continuous surveillance which the majority opinion assumes is maintained by Federal agents of the materials and the process of manufacture. Mr. Reed's letter is presented in a way that is calculated to mislead the Court's statement that the materials and process of manufacture are under continuous surveillance is in accordance with the law.

Section 2322, I. R. C. (c) expressly provides:

> "Every manufacturer of process or renovated butter shall * * * conduct his business *under such surveillance* of officers and agents as the Commissioner, with the approval of the Secretary may by regulation require."
> (Emphasis supplied)

No reference is made to the requirements in Regulations 7, B. D. I. Order No. 1—Revised, reading as follows:

> "Section 1. To determine whether or not materials used in the manufacture of process or renovated butter are deleterious to health or unwholesome in the finished product, a sample of such butter shall be taken.

"Section 2. Such sample shall be drawn in the following manner: *A sample will be taken from every package of each lot.* However, (A) if a lot includes two or more packages from one *churning*, a sample may be taken from one package only; or (B) if the separate churnings are not indicated, not less than one sample from each 10 tubs may be taken. Additional samples may be taken if, in the opinion of the inspector, such action is necessary to obtain representative samples of such butter.

"Sec. 3. The samples thus obtained, properly identified, shall be promptly forwarded to the Department for examination and chemical analysis.

"Sec. 4. If such butter is found upon such examination and such chemical analysis to be deleterious to health or unwholesome, and such butter is intended for exportation or shipment into other States, or is in the course of exportation, or in the course of such shipment, the Secretary shall confiscate the same to prevent its use for food purposes. The Secretary may release such butter to its owner for industrial use, upon such conditions as he deems necessary to prevent its use for food purposes."

A letter from Mr. J. M. Kidd, president of the Cloverleaf Butter Company, printed in the Appendix, fully explains the way inspection has been and is now handled by the Government.

## DIFFICULTY OF DETECTION

The State argues that "it is practically an impossibility to detect *filth in* renovated butter which is manufactured from filthy and unwholesome packing stock." The authority for that statement is not cited and we

know of none. It might be accurate to say that it is an impossibility to detect filth in butter that has been properly renovated, because there is no filth in butter that has been properly renovated. *"Filth" cannot survive the washing, steaming, settling, straining, centrifugation, pasteurization and clarification, that all packing stock must undergo, if it is properly renovated according to the latest scientific methods.* That is the reason why filth cannot be detected in packing stock butter that has been properly renovated. The filth is not there.

## BUREAU OF DAIRY INDUSTRY NOT AFFECTED

On page 10 of the respondents' brief it is said:

> "The Court's opinion will upset the long prevailing organization of the Bureau of Dairy Industry."

And complaint is made that it will now be required to maintain a constant vigil. *The petitioner would welcome that constant vigil.* Instead of attempting to escape Federal Inspection we welcome it. We cannot live under a dozen different kinds of State inspections and State standards, and even different inspections and standards in Alabama itself.

Let's be practical and take a typical case. Counter freezers, by other than the "continuous flow" method are in operation all over Alabama. They are in State Schools and State institutions of every kind. The State Health Officer (at the time a case was tried) ate ice cream daily manufactured in a "non-continuous flow"

counter freezer in the City of Montgomery. The City of Birmingham, however, will not allow a non-continuous flow counter freezer to be operated in the City. The Supreme Court of Alabama upheld the city.

*Gilchrist Drug Co. v. City of Birmingham*, 234 Ala. 204.

Cloverleaf Butter Company is located in Birmingham, Alabama. The State's contention in effect is, it may seize any packing stock butter it claims is unwholesome, but if the State does not go as far as the City of Birmingham thinks it should go, the City of Birmingham may step in and seize butter passed by the State itself.

The Bureau of Dairying is not affected by this decision because it has never depended on the State to do anything about packing stock butter. In fact the State never attempted to do anything about packing stock butter in interstate commerce until April 17, 1939, when these respondents misconceived their duty and authority. No other State has attempted to do any such thing and no state is attempting to do so now.

It is respectfully submitted that the application for rehearing should be denied.

HORACE C. WILKINSON,
ERLE PETTUS,
VICTOR H. SMITH,
Birmingham, Alabama,
*Attorneys for Petitioners.*

I hereby certify that a copy of the foregoing has been mailed to the Attorney General of Alabama, by first class mail at his postoffice address in Montgomery, Alabama.

This the 5th day of March, 1942.

HORACE C. WILKINSON,
*Attorney for Petitioner.*

# APPENDIX

March 2, 1942.

Hon. Horace C. Wilkinson.
Attorney at Law,
608 Farley Building,
Birmingham, Alabama.

Dear Mr. Wilkinson:

We have considered the letter of Mr. O. E. Reed, Chief, Bureau of Dairy Industry, to Mr. George H. Marsh, Director of the Division of Agricultural Chemistry, dated February 16, 1942, printed in the Appendix to the Application for Rehearing in Cloverleaf Butter Company vs. Haygood Patterson as Commissioner, etc., et al, in the Supreme Court of the United States.

It is a matter of some surprise that this letter is used in a way that might mislead the Court.

Mr. Reed's letter was doubtless written in response to an adroitly propounded inquiry. Fairness requires that the Court should be informed that the Cloverleaf Butter Company's plant, raw material and finished product were inspected and examined weekly, and quite frequently twice a week for many years prior to 1939. Our finished products during this time were sampled; the inspections were rigid; the samples were sent to Washington for examination. These inspections were made by deputized inspectors from the Bureau of Animal Industry (Meat Inspection Law) in Birmingham. The record of the Cloverleaf Butter Company's finished

product over that long period of close inspection was most excellent.

About 1939 the inspection was taken out of the hands of the deputized inspectors in Birmingham and conducted by the Bureau of Dairying directly from Washington. The Bureau doubtless felt justified in this procedure in order to save the expense involved in paying the meat inspectors stationed in Birmingham in view of the excellent record of this Company over the long period of close inspection, which indicated a fixed policy on our part to produce the most healthful finished product possible.

Since the Bureau of Dairying Industry has taken over the inspection of the Cloverleaf Butter Company directly from Washington, instead of by resident inspectors stationed in Birmingham in the Meat Inspection service, the high quality of our product has apparently convinced the department that closer inspection, although authorized by law and welcomed by this company, has been considered unnecessary.

The Cloverleaf Butter Company employs the latest scientific methods. Its product is marketed all over the United States and meets the pure food requirements of the states, and all of the larger cities in each state.

The attempt on the part of the State to make it appear that the State and the Federal Agencies were harmoniously working together to enable the State to seize packing stock butter is indefensible. It is well known that shortly after the State asserted a right to seize packing stock butter the Secretary of Agriculure immediately strongly recommended legislation to Congress

to place the seizure of packing stock butter exclusively in his hands so as to exclude State action.

Yours very truly,

CLOVERLEAF BUTTER COMPANY,

By: James M. Kidd,

*President.*

pp. 4, 14, 15.

# SUPREME COURT OF THE UNITED STATES.

No. 28.—October Term, 1941.

| | |
|---|---|
| Cloverleaf Butter Company, Petitioner, *vs.* Haygood Patterson, as Commissioner of Agriculture and Industries of the State of Alabama, et al. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit. |

[February 2, 1942.]

Mr. Justice Reed delivered the opinion of the Court.

The petitioner, Cloverleaf Butter Company, is engaged at Birmingham, Alabama, in the manufacture of process or renovated butter from packing stock butter. It obtains 25% of its supplies of packing stock butter from the farmers and country merchants of Alabama and 75% from those of other states, and it ships interstate 90% of its finished product. The production of renovated butter is taxed and regulated by the United States. Internal Revenue Code, c. 16, §§ 2320 to 2327 inc. It is also regulated by Alabama. Ala. Code 1940, Tit. 2, c. 1.

The respondents, Alabama officials charged with the duty of enforcing the Alabama laws in regard to renovated butter, entered petitioner's factory and in a little more than a year seized on sixteen separate occasions a total of over twenty thousand pounds of packing stock butter, the material from which the finished product is made. Defendants also seized some butter moving to the factory in interstate commerce. There is no allegation that condemnation proceedings have been completed.

Alleging repeated seizures and danger of their continuance to the demoralization and financial impairment of its business, petitioners brought an action, Judicial Code § 24(1), in the District Court to enjoin the defendants from acting under the Alabama statute either to determine the wholesomeness of renovated butter made from the raw material in petitioner's hands, to inspect its raw material and plant or to seize and to detain petitioner's packing stock butter. The theory of the bill is that the federal legislation and regulations concerning the manufacture of process or

renovated butter exclude such state action. Cf. *Hebe Co.* v. *Shaw*, 248 U. S. 297; *Corn Products Refg. Co.* v. *Eddy*, 249 U. S. 427. There was a motion to dismiss on the ground that the complaint did not state a cause of action. A stipulation entitled as one of "facts" was entered into. The District Court dismissed the bill, the Circuit Court of Appeals affirmed, 116 F. 2d 227, and we granted certiorari because of the important question of federal law involved in petitioner's contention that these federal statutes providing for regulation of production of a commodity excluded state action. 313 U. S. 551.

The so-called stipulation of facts just mentioned is really a limitation of issues. One paragraph of the stipulation will crystallize the essential elements of the dispute. It reads: "The parties to this cause stipulate and agree that the legal questions in dispute between the parties are: . . . 2. Does the inspection of packing stock butter, in interstate commerce, used by the plaintiff in the manufacture of process or renovated butter as alleged in the bill of complaint, made or directed to be made by the Secretary of Agriculture of the United States, pursuant to the Federal laws and regulations relating to renovated or process butter, have the effect in connection with said Federal laws of excluding the State of Alabama, its officers and agents, from inspecting or seizing or suspending the packing stock butter, in interstate commerce out of which renovated butter to be sold in interstate commerce as alleged in the complaint is manufactured by the plaintiff as alleged in the complaint?" As other paragraphs state variations of this controversy or conclusions of law not controlling on the courts, *Estate of Sanford* v. *Comm'r*, 308 U. S. 39, 51, we need not consider them further. The central question presented in the petition for certiorari accords with the excerpt from the stipulation.

Apparently there is no specific allegation or admission that the packing stock butter which Alabama inspected and seized was the property of the petitioning manufacturer at the time. It has, however, been so treated by the courts and parties and properly so, we conclude, from the allegations of the bill.[1] The reach of this de-

[1] Petitioner, paragraph 19 of its bill of complaint, avers that packing stock butter is delivered to it for processing which is produced in Alabama and other states; that the Alabama officials, paragraph 20, claim the right to enter the premises where it receives the butter acquired by it in interstate commerce and to "seize, suspend or otherwise deprive plaintiff of the right to use such raw material or packing stock butter, and to stop and search trucks moving in interstate commerce hauling said raw material from places without the State

cision is therefore limited to Alabama's inspection and seizure of packing stock butter, actually owned by petitioner and held in its own hands or those of its bailees, whether in factory, warehouse or course of carriage, for manufacture into process or renovated butter for interstate or foreign commerce.

The test to be applied to the action of the state in seizing material intended solely for incorporation into a product prepared for interstate commerce is the effect of that action upon the national regulatory policy declared by the federal statute. Cf. *Illinois Nat. Gas Co.* v. *Central Ill. Pub. Serv. Co.*, No. 100, 1941 Term, decided January 5, 1942, slip opinion, p. 4. Not only does Congressional power over interstate commerce extend, the "Laws of any State to the Contrary notwithstanding,"[2] to interstate transactions and transportation, but it reaches back to the steps prior to transportation and has force to regulate production "with the purpose of so transporting" the product. *United States* v. *Darby*, 312 U. S. 100, 117. It extends to the intrastate activities which so

---

of Alabama to plaintiff's place of business in Birmingham, Alabama, and to seize, suspend or otherwise deprive plaintiff the right to use the said raw material or packing stock butter being so transported in interstate commerce and to [stop and search] trucks transporting the aforesaid raw material from points in Alabama to plaintiff's plant in Birmingham, Alabama, to be used in the manufacture of process or renovated butter as aforesaid."

Petitioner further avers, as to seizures at its plant, "Between, to wit, the 17th day of April, 1939, and the 22nd day of June, 1940, defendants on 16 separate occasions, seized in Birmingham, Alabama, a total of 20924 pounds of plaintiff's raw material or packing stock butter which originated in whole or in part in states of the United States outside of the State of Alabama and which had been so delivered to the plaintiff's plant in Birmingham, Alabama, as raw material and which was not being sold, offered or exposed for sale, or attempted for sale in its then condition but was being held by the plaintiff solely and exclusively for the purpose of using the same as raw material out of which to manufacture process or renovated butter in the usual course of plaintiff's business. . . . Plaintiff avers on, to wit, the 21st day of June, 1940, in making the last seizure, above referred to, the defendants stopped a truck moving in interstate commerce from the State of Georgia to the State of Alabama transporting said raw material known as packing stock butter from the State of Georgia to the plaintiff in Birmingham, Alabama. Plaintiff avers that as a result of the seizure of said raw materials by defendants, it has been denied the use thereof; the seizure and detention of said raw material has caused great financial loss to the plaintiff in that plaintiff is required to pay the storage on the same and is denied the use of such raw materials that plaintiff sorely needs in the conduct of its business, and has caused plaintiff's plant to remain idle from time to time for the lack of sufficient raw material to keep the same operating; that said action of the defendants demoralizes plaintiff's employees who are employed, to operate said plant, and is calculated to and does interfere with the sale of its finished product in interstate commerce."

[2] Constitution, Article VI.

affect commerce as to make regulation of them appropriate means to the attainment of a legitimate end, regulation of interstate commerce. *Id.*, 118 *et seq.*, and cases cited. By the regulatory provisions of I. R. C. § 2325, note 10, *infra*, the entire process of manufacture comes under federal supervision. Thus so far as any situation here involved is concerned, the scope of Congressional power is such that it may override the exercise of state power and render impossible its application to petitioner's manufacturing processes.

This power of Congress to exercise exclusive control over operations in interstate commerce is not in dispute here.[3] Nor is this power limited to situations where national uniformity is so essential that lacking Congressional permission all state action is inadmissible notwithstanding a complete absence of federal legislation.[4] Exclusive federal regulation may arise, also, from the exercise of the power of Congress over interstate commerce where in the absence of Congressional action the states may themselves legislate. It has long been recognized that in those fields of commerce where national uniformity is not essential, either the state or federal government may act. *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *California* v. *Thompson*, 313 U. S. 109, 114. Where this power to legislate exists, it often happens that there is only a partial exercise of that power by the federal government. In such cases the state may legislate freely upon those phases of the commerce which are left unregulated by the nation.[5] But where the United States

[3] Cases which sustain state enactments as permissible, where federal legislation generally applicable to the field exists, recognize that federal action might forbid or exclude the state statutes approved in those instances. Savage v. Jones, 225 U. S. 501, 529: "The question remains whether the statute of Indiana is in conflict with the act of Congress known as the Food and Drugs Act of June 30, 1906 (34 Stat. 768, c. 3915). For the former, so far as it affects interstate commerce even indirectly and incidentally, can have no validity if repugnant to the Federal regulation." Corn Products Refg. Co. v. Eddy, 249 U. S. 427; Mintz v. Baldwin, 289 U. S. 346, 351; Pacific States Co. v. White, 296 U. S. 176, 183; Hartford Indemnity Co. v. Illinois, 298 U. S. 155, 158; Welch Co. v. New Hampshire, 306 U. S. 79, 85; Eichholz v. Comm'n, 306 U. S. 268, 274; Duckworth v. Arkansas, No. 46, 1941 Term, decided December 15, 1941.

[4] Cooley v. Board of Wardens, 12 How. 299, 319; Bowman v. Chicago & Northwestern Ry. Co., 125 U. S. 465, 485; Leisy v. Hardin, 135 U. S. 100, 119; Minnesota Rate Cases, 230 U. S. 352, 399. Where the federal legislation authorizes state action, such state action is permissible even as to matters which could otherwise be regulated only by uniform national enactments. In re Rahrer, 140 U. S. 545, 561; Clark Distilling Co. v. West'n Md. Ry. Co., 242 U. S. 311, 325, *et seq.*; Whitfield v. Ohio, 297 U. S. 431; Ky. Whip & Collar Co. v. I. C. R. Co., 299 U. S. 334, 350.

[5] Merchants Exchange v. Missouri, 248 U. S. 365, 368 (United States Warehouse Act permits state laws for inspection and weighing by specific direction

exercises its power of legislation so as to conflict with a regulation of the state, either specifically[6] or by implication,[7] the state legislation becomes inoperative and the federal legislation exclusive in its application.

When the prohibition of state action is not specific but inferable from the scope and purpose of the federal legislation, it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation.[8]

Apparently there are no cases of this Court dealing specifically with state interference with federally regulated manufacturing. It is evident, we think, that the same principles govern state action in this field as in the instances cited under note 7 to show the exclusive power of federal enactments in transportation, employers liability, quarantine and aliens. The rule is clear that state action may be excluded by clear implication or inconsistency. Its application to individual cases creates difficulties. The differentiation between cases where the assumption of federal power is exclusive and where it admits state action is narrow. For example, in *Oreg.-Washington*

---

of § 29, 39 Stat. 490; cf. Act of March 2, 1931, c. 366, 46 Stat. 1465); Whipple v. Martinson, 256 U. S. 41. (state regulates prescriptions of narcotics further than United States); N. W. Bell Tel. Co. v. Ry. Comm'n, 297 U. S. 471, 479 (telephone depreciation); Hartford Indemnity Co. v. Illinois, 298 U. S. 155, 159 (specific authority for state laws to continue in operation); Kelly v. Washington, 302 U. S. 1, 9 (state inspection of hulls omitted from federal inspection); S. C. Hwy. Dept. v. Barnwell Bros., 303 U. S. 177, note 5 (state regulation of truck weight and width omitted from federal regulation by the federal Motor Carrier Act of 1935, 49 Stat. 546); Welch Co. v. New Hampshire, 306 U. S. 79 (maximum hours of employees regulated by state prior to effective date of federal regulation); Eichholz v. Comm'n, 306 U. S. 268, 274 (intrastate transportation regulations infringed); Maurer v. Hamilton, 309 U. S. 598, 606 (state regulation of size and weight reserved from federal regulation). Frequently this Court has recognized the power of the state in such circumstances over other interstate carriers. Minnesota Rate Cases, 230 U. S. 352, 408, and cases cited; Erie R. R. Co. v. Williams, 233 U. S. 685; Erie R. R. Co. v. Public Util. Commrs., 254 U. S. 394, 409; Missouri Pacific R. Co. v. Norwood, 283 U. S. 249.

[6] Cf. 7 U. S. C. § 269 (1940); 29 U. S. C. § 160(a) (1940).

[7] Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, 437; Adams Express Co. v. Croninger, 226 U. S. 491, 505; New York Central R. R. Co. v. Winfield, 244 U. S. 147, 150; Oreg.-Washington Co. v. Washington, 270 U. S. 87, 101 (cf. amendment to meet decision, 44 Stat. 250); Napier v. Atlantic Coast Line, 272 U. S. 605, 612; Missouri Pac. v. Porter, 273 U. S. 341, 345; Hines v. Davidowitz, 312 U. S. 52, 66; Illinois Natural Gas Co. v. Central Ill. Pub. Serv. Co., No. 100 this Term, decided January 5, 1942, p. 7 slip opinion.

[8] Texas & Pac. Ry. v. Abilene Cotton Oil Co., *supra*; Savage v. Jones, 225 U. S. 501, 533; Corn Products Refg. Co. v. Eddy, 249 U. S. 427, 435; Whipple v. Martinson, 256 U. S. 41, 45; Mintz v. Baldwin, 289 U. S. 346, 350; Kelly v. Washington, 302 U. S. 1, 10.

*Co.* v. *Washington*, 270 U. S. 87, Section 8 of the Plant Quarantine Act, 37 Stat. 315, as amended 39 Stat. 1165, 7 U. S. C. § 161, was held to exclude a state quarantine against plant infestation. Yet a little later in *Mintz* v. *Baldwin*, 289 U. S. 346, a very similar statute, the Cattle Contagious Diseases Act was held to permit a state quarantine, because this latter act differed from the former, in that its provisions, page 352, "by specification of the cases in which action under it shall be exclusive, disclose the intention of Congress that, subject to the limitations defined, state measures may be enforced. This difference is essential and controlling." Cf. 21 U. S. C. § 126.

It is urged that the later *Welch*, *Eichholz* and *Maurer* cases, cited above, which allow state action when the federal statute does not cover the particular point regulated show a trend away from the doctrine of the *Oreg.-Washington Co.* decision. Other similar instances may be found in notes 3 and 5, *supra*. In all of these, however, it was the ruling of this Court that the federal enactment was consistent with the narrow regulation sought to be enforced by the state so that the state enactment did not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S. 52, 67. As the principle upon which the cases referred to in this paragraph are decided is clear, a single comparison will sufficiently illustrate the reasons which lead to a denial of state power. *Savage* v. *Jones*, 225 U. S. 501, construed an Indiana statute requiring disclosure of formulas on foods offered for sale in Indiana while in interstate commerce. The Pure Food and Drugs Act, 34 Stat. 768, prohibited, so far as here pertinent, interstate shipments if misbranded by bearing "any statement, design or device . . . false or misleading." This Court said, p. 532:

"Congress has thus limited the scope of its prohibitions. It has not included that at which the Indiana statute aims. Can it be said that Congress, nevertheless, has denied to the State, with respect to the feeding stuffs coming from another State and sold in the original packages, the power the State otherwise would have to prevent imposition upon the public by making a reasonable and nondiscriminatory provision for the disclosure of ingredients, and for inspection and analysis?"

The Indiana Act was upheld. On the other hand *McDermott* v. *Wisconsin*, 228 U. S. 115, makes plain the basis for prohibiting interferences with federal power. In this latter case a Wisconsin

law required glucose mixtures offered for retail sale to be labeled "Glucose flavored with" the flavoring material. Any other "designation or brand" on the package was prohibited. A glucose mixture was offered labeled "Karo Corn Syrup" "10% Cane Syrup, 90% Corn Syrup." Pointing out that federal authority, for the sake of efficiency in protecting the public against misbranding in interstate trade, extended far enough to regulate labeling on packages while being offered to consumers, and that the Pure Food and Drug Act tolerated the more euphemistic label prohibited by the state, this Court said, p. 133:

"Conceding to the State the authority to make regulations consistent with the Federal law for the further protection of its citizens against impure and misbranded food and drugs, we think to permit such regulation as is embodied in this statute is to permit a State to disgredit and burden legitimate Federal regulations of interstate commerce, to destroy rights arising out of the Federal statute which have accrued both to the Government and the shipper, and to impair the effect of a Federal law which has been enacted under the Constitutional power of Congress over the subject."

In the *Savage* case there was no conflict, inconsistency or interference; in the *McDermott* case there was. *McDermott* pointed out the distinction, and the inapplicability of the *Savage* rule to the Wisconsin situation. 228 U. S. 115, 131-32.

Turning to the statutes in question we find that the greater part of the legislation relating to process or renovated butter is in § 2320 to § 2327 of the Internal Revenue Code.[9] These sections define process or renovated butter, fix the rate of poundage tax upon it, as well as the amount of special tax upon its manufacturers and provide for their collection. They require manufacturers to file such notices and inventories, keep such books, render such returns, post such signs, affix such number to his factory, and furnish such bond as the Treasury Department may require. Wholesale dealers are required to keep books and render returns to the same department. Penalties are provided. Specific provisions are made for inspection of the places of manufacture or storage of the materials and the renovated butter itself. Power is given to confiscate the finished product. Sanitary provisions applicable for slaughtering, meat canning or similar establishments are extended to cover process and renovated butter factories. The sections necessary for

[9] These sections are derived from the Acts of August 2, 1886, c. 840, 24 Stat. 209; May 9, 1902, c. 784, 32 Stat. 193; August 10, 1912, c. 284, 37 Stat. 273.

the discussion are set out in the note below.[10] The references to animal and meat inspection statutes in § 2327(b) made applicable to the butter in question the power of the Secretary of Agriculture to inspect and certify as wholesome for human food salt pork and bacon intended for exportation and the requirement that inspected carcasses of cattle, sheep and swine found unwholesome shall not be subjects of interstate transportation.

There are two provisions of law applicable to process and renovated butter production which may be conveniently considered and disposed of at this point.

---

[10] § 2325. Inspection, manufacture, storage, and marking of process or renovated butter. "The Secretary of Agriculture is authorized and required to cause a rigid sanitary inspection to be made, at such times as he may deem proper or necessary, of all factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market, and of the products thereof and materials going into the manufacture of the same. All process or renovated butter and the packages containing the same shall be marked with the words 'Renovated Butter' or 'Process Butter' and by such other marks, labels, or brands and in such manner as may be prescribed by the Secretary of Agriculture, and no process or renovated butter shall be shipped or transported from its place of manufacture into any other State or Territory or the District of Columbia, or to any foreign country, until it has been marked as provided in this section. The Secretary of Agriculture shall make all needful regulations for carrying this section and sections 2326(c) and 2327(b) into effect and shall cause to be ascertained and reported from time to time the quantity and quality of process or renovated butter manufactured, and the character and the condition of the material from which it is made. And he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States or in course of exportation or shipment he shall have power to confiscate the same."

§ 2326(c). Failure to comply with provisions relating to the manufacture, storage, and marking of process or renovated butter. "Any person, firm, or corporation violating any of the provisions of section 2325 shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than $50 nor more than $500 or by imprisonment not less than one month nor more than six months, or by both said punishments, in the discretion of the court."

§ 2327(b). Inspection of live cattle and meat. "All parts of an act providing for an inspection of meats for exportation, approved August 30, 1890, c. 839, 26 Stat. 414, and of an Act to provide for the inspection of live cattle, hogs, and the carcasses and products thereof which are the subjects of interstate commerce, appproved March 3, 1891, c. 555, 26 Stat. 1089, and of amendment thereto approved March 2, 1895, c. 169, § 1, 28 Stat. 732, which are applicable to the subjects and purposes described in section 2325 shall apply to process or renovated butter."

§ 2327(c). Slaughtering and meat canning. "The sanitary provisions for slaughtering, meat canning, or similar establishments as set forth in the act of June 30, 1906, c. 3913, 34 Stat. 676, shall be extended to cover renovated butter factories as defined in this subchapter, under such regulations as the Secretary of Agriculture may prescribe."

(a) By section one of the Act of May 9, 1902, it is provided that importations of processed and renovated butter shall be subject to the laws of the state as though produced therein.[11] This is obviously an adaptation of the Wilson or Original Packages Act to the problem of butter substitutes, passed to overcome the force of some of the cases forbidding state prohibition of sales of these substitutes.[12] It is clearly inapplicable to the case now under consideration, but indicates a Congressional purpose not to hinder the free exercise of state power except as it may be inconsistent with the federal legislation. The argument that it is improper to infer a restriction on confiscation of material when confiscation of product is permitted fails to give weight to the difference between a confiscation which interferes with production under federal supervision and confiscation after production because of a higher standard demanded by a state for its consumers. The latter type is permissible under all the authorities.

(b) By section four of the same Act, R. S. § 3243 was made "to extend to and include and apply to" manufacture of processed and renovated butter. That section, now I. R. C. § 3276, provides that the payment of the tax laid by the act under consideration "shall not be held to exempt any person from any" state penalty "or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State." It is urged by respondent that this section makes it "clear that the power of the States over the subject of the manufacture and sale of process and renovated butter within their respective limits was to be unrestricted, even though the effect of such regulation might be the imposition of an indirect burden upon interstate commerce." This

[11] 32 Stat. 193, 21 U. S. C. § 25. "All articles known as oleomargarine, butterine, imitation, process, renovated, or adulterated butter, or imitation cheese, or any substance in the semblance of butter or cheese not the usual product of the dairy and not made exclusively of pure and unadulterated milk or cream, transported into any State or Territory or the District of Columbia, and remaining therein for use, consumption, sale, or storage therein, shall, upon the arrival within the limits of such State or Territory or the District of Columbia, be subject to the operation and effect of the laws of such State or Territory or the District of Columbia, enacted in the exercise of its police powers to the same extent and in the same manner as though such articles or substances had been produced in such State or Territory or the District of Columbia, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

[12] Cf. 26 Stat. 313; In re Rahrer, 140 U. S. 545; Schollenberger v. Pennsylvania, 171 U. S. 1; Collins v. New Hampshire, 171 U. S. 30; State v. Collins, 70 N. H. 218, aff. by an equally divided court, 187 U. S. 636; Plumley v. Massachusetts, 155 U. S. 461.

section without doubt manifests the will of Congress that federal taxation shall not, of itself, incapacitate the state. *Austin* v. *Tennessee*, 179 U. S. 343; *Plumley* v. *Massachusetts*, 155 U. S. 461, 466. In our view, however, the section goes no farther than to make certain that federal taxation shall not paralyze state action. Other regulations may or may not supersede state laws. Cf. *Merchants Exchange* v. *Missouri*, 248 U. S. 365, 368; *Hartford Indemnity Co.* v. *Illinois*, 298 U. S. 153, 159.

There are also two other elements of the federal legislation which may be considered from the negative viewpoint. This is not solely a revenue act. Respondent strongly urges that it must be treated as primarily for the purpose of increasing federal income and that therefore there should be no judicial deduction that the incidental regulatory features are exclusive. For this there is support in the precedents. *McCray* v. *United States*, 195 U. S. 27.[13] While there has long been recognition of the authority of Congress to obtain incidental social, health or economic advantages from the exercise of constitutional powers,[14] it has been said that such collateral results must be obtained from statutory provisions reasonably adapted to the constitutional objects of the legislation. *Linder* v. *United States*, 268 U. S. 5, 17. But here the respondent's contention is inapplicable because the regulatory provisions in controversy are authorized by the Commerce Clause. *Pittsburgh Melting Co.* v. *Totten*, 248 U. S. 1, 8; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381; *United States* v. *Darby*, *supra*, 119.

Further, we agree with respondent's contention that there is no authority to confiscate or destroy materials under the renovated butter act. It should be noted that packing stock adulterated under the definitions of § 402 of the Federal Food, Drug and Cosmetic Act, 52 Stat. 1046, when introduced into or while in interstate commerce may be confiscated under § 304 while in interstate commerce or at any time thereafter. Cf. *United States* v. *Nine Barrels of Butter*, 241 F. 499. Petitioner argues that the provisions for meat inspection made applicable to process and renovated butter factories by I. R. C. § 2327, note 10, *supra*, include Title 21, § 72 of the United States Code. Section 72 does authorize the de-

[13] Cf. In re Kollock, 165 U. S. 526; Plumley v. Massachusetts, 155 U. S. 461, 466. These were based on the earlier act of 1886, 24 Stat. 209, which did not carry the inspection and condemnation provisions now applicable to processed and renovated butter.

[14] Veazie Bank v. Fenno, 8 Wall. 533; McCray v. United States, 195 U. S. 27, 55; United States v. Darby, 312 U. S. 100, 115.

struction of unfit carcasses of cattle, hogs and sheep intended for human consumption and we assume, if applicable, would authorize a similar destruction of the materials intended for butter manufacture. Section 72, however, is derived from 34 Statutes at Large 674. The provisions which I. R. C. § 2327 makes applicable are the sanitary provisions as set forth in the Act of June 30, 1906, c. 3913, 34 Stat. 676.[15] These relate only to inspection and not to condemnation or destruction.[16] Nor do we find such power in the regulatory provisions of § 2325, note 10, *supra*, or any interpretation by the Department of Agriculture leading to that conclusion. The regulations contain no directions for condemnation. B. D. I. Order No. 1—Revised, December 24, 1936; 9 C. F. R. 301. The views of the Solicitors of Agriculture have long been in accord with our conclusion. Opinion No. 2829, October 18, 1940.[17]

The state act which petitioners say conflicts and interferes with the Federal is the usual type of general food and drug regulation. Alabama Code 1940, Tit. 2, c. 1. Power is conferred on the state board of agriculture and industries to promulgate rules and regulations with the commissioner of agriculture and industries as the

---

[15] "The Secretary of Agriculture shall cause to be made, by experts in sanitation or by other competent inspectors, such inspection of all slaughtering, meat canning, salting, packing, rendering, or similar establishments in which cattle, sheep, swine, and goats are slaughtered and the meat and meat food products thereof are prepared for interstate or foreign commerce as may be necessary to inform himself concerning the sanitary conditions of the same, and to prescribe the rules and regulations of sanitation under which such establishments shall be maintained; and where the sanitary conditions of any such establishment are such that the meat or meat food products are rendered unclean, unsound, unhealthful, unwholesome, or otherwise unfit for human food, he shall refuse to allow said meat or meat food products to be labeled, marked, stamped, or tagged as 'inspected and passed.'"

[16] An error appeared in 26 U. S. C. § 997(c) in the codification of the proviso of 37 Statutes at Large 273, which extended the sanitary provisions of the Act of June thirtieth, nineteen hundred and six (Thirty-fourth Statutes, page six hundred and seventy-six) to renovated butter, so that the codification read: "The sanitary provisions for slaughtering, meat canning, or similar establishments as set forth in sections 71 to 93 of Title 21, shall be extended to cover renovated butter factories as defined in this subchapter, under such regulations as the Secretary of Agriculture may prescribe." This error was corrected in I. R. C. § 2327(c). See note 10, *supra*.

[17] Legislative history indicates that a contrary purpose was in the mind of the departmental proponents of the 1912 legislation. See 48 Cong. Rec. 2690-91, 6325; House Rep. No. 271, 62d Cong., 2d Sess., p. 4; Sen. Rep. No. 696, 62d Cong., 2d Sess., p. 2; Conference Report, House Rep. No. 1150, 62d Cong., 2d Sess., pp. 1, 10; Hearings on the Estimates of Appropriations (Agricultural Appropriation Bill), House Committee on Agriculture, 62d Cong., 2d Sess., pp. 325-328; Hearing on Agriculture Appropriation Bill, Senate Subcommittee of Committee on Agriculture and Forestry, 62d Cong., 2d Sess., pp. 14-15.

chief administrative official. The issue arises over action taken under § 495, quoted so far as pertinent below.[18]

The controversy comes to this. The federal law requires, § 2325, note 10, supra, "a rigid sanitary inspection . . . of all factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market, and of the products thereof and materials going into the manufacture of the same," i. e., packing stock butter.[19] But as we have seen, the Secretary of Agriculture of the United States cannot condemn the packing stock butter. The commissioner of agriculture and industries of Alabama claims authority under the state statute to condemn packing stock butter held for renovation.[20] Does the state's claim interfere or conflict with the federal power?

On the face of the statutes a solution of the conflict might be reached on the ground that the state statute authorizes condemnation only when the packing stock butter is held for sale "within the state" in its then condition. Such a suggestion does not meet the issue, however. The bill alleges and the motion to dismiss and stipulation admit the seizure of a kind of raw material none of which, either that seized or used, had ever been so held or offered for sale in packing stock condition.

We lay aside also, as inapplicable, the suggestion that the highest court of Alabama in *State* v. *Cecil*, 216 Ala. 391, 113 So. 254, held that the Agricultural Code of that state was not intended to cover goods in interstate commerce and that therefore since these materials are in interstate commerce they are beyond the scope of

---

18. "Any article, substance, material, or product, the possession and sale of which is regulated under the provisions of this chapter, which is adulterated, misbranded . . . within the meaning of any provision of this chapter, and which is manufactured for sale, held in possession with intent to sell, offered or exposed for sale, or sold or delivered within this state, shall be liable to be proceeded against in the circuit court of the county where the same is found, and seized for confiscation by writ of attachment for condemnation. Such writ shall issue upon the sworn complaint of the commissioner or his duly authorized agent, . . . If a judgment of condemnation and confiscation is rendered against such article or product as being adulterated . . . the same shall be disposed of by destruction or sale, as the court may direct . . . ."

19. 26 U. S. C. § 2325. "And he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States or in course of exportation or shipment he shall have power to confiscate the same."

20. ". . . which is manufactured for sale, held in possession with intent to sell, offered or exposed for sale, or sold or delivered within this State . . . ."

the Alabama Code. The opinion in the *Cecil* case dealt with a different section, one relating to licensing farm product commission merchants. The defendant was engaged in interstate business only. For that section the decision of the Alabama court is final. It did not consider the section here under examination and, in our view, which of course is not controlling on Alabama courts, § 495 in the absence of conflict or interference with a specific federal act would be effective to condemn goods held in Alabama under the terms of the section, even though the goods were commingled with a mass, some of which would be ultimately exported from the state. State power over food supplies held within its borders would extend at least so far. *Sligh* v. *Kirkwood*, 237 U. S. 52. On the other hand, federal control over interstate commerce would, if it is exercised, extend over that portion of the material which would ultimately be sold in Alabama as renovated butter. *The Minnesota Rate Cases*, 230 U. S. 352, 399; *Currin* v. *Wallace*, 306 U. S. 1, 11; *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 568; *United States* v. *Darby*, 312 U. S. 100, 122. But, of course, if any of the finished product is offered for sale in Alabama, such product becomes immediately subject to the requirements of the pure food laws of that state.

Coming finally to the query whether the state's claim interferes or conflicts with the purpose or provisions of the federal legislation, we determine that it does. The manufacture and distribution in interstate and foreign commerce of process and renovated butter is a substantial industry which, because of its multi-state activity, cannot be effectively regulated by isolated competing states. Cf. *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 588; *United States* v. *Darby*, 312 U. S. 100, 122. Its wholesome and successful functioning touches farm producers and city consumers. Science made possible the utilization of large quantities of packing stock butter which fell below the standards of public demand[21] and Congress undertook to regulate the production in order that the resulting

[21] The annual report of the Commissioner of Internal Revenue for the year ending June 30, 1903, shows that during the first fiscal year after the adoption of the renovated butter act the production was 54,658,790 pounds. House Doc. No. 11, 58th Cong., 2d Sess., p. 161. In more recent years according to the report for the year ending June 30, 1940, p. 144, table 39, the production

| | | | |
|---|---|---|---|
| 1931 | 1,499,041 lbs. | 1936 | 2,252,920 lbs. |
| 1932 | 1,124,299 " | 1937 | 2,737,181 " |
| 1933 | 1,002,131 " | 1938 | 2,435,499 " |
| 1934 | 1,219,756 " | 1939 | 2,906,117 " |
| 1935 | 1,844,561 " | 1940 | 2,706,852 " |

commodity might be free of ingredients deleterious to health. It left the states free to act on the packing stock supplies prior to the time of their delivery into the hands of the manufacurer and to regulate sales of the finished product within their borders. But once the material was definitely marked for commerce by acquisition of the manufacturer, it passed into the domain of federal control.

Inspection of the factory and of the material was provided for explicitly. Confiscation of the finished product was authorized upon a finding of its unsuitability for food through the use of unhealthful or unwholesome materials, a finding that might be based upon visual or delicate laboratory tests, or upon observation of the use of such materials in the process of manufacture: I. R. C. § 2325; 9 C. F. R. §§ 301.41-43. By the statutes and regulations,[22] the Department of Agriculture watches the consumer's interest throughout the process of manufacture and distribution. It sees to the sanitation of the factories in such minutiae as the clean hands of the employees and the elimination of objectionable odors, inspects the materials used, including air for aerating the oils and confiscates the finished product when materials which would be unwholesome if utilized are present after manufacture.[23] Confiscation by the state of material in production nullifies federal discretion over ingredients.

It is said that the state and the United States have worked cooperatively in protecting consumers from vicious practices in the handling of processed butter; that any action by the state aids the policy of both in disposing of unfit food and that therefore a harmonious federal state relationship should not be hampered. Our duty to deal with contradictory functions of state and nation on any occasion and particularly when one or the other is challenged by private interests calls for the utmost effort to avoid conclusions which interfere with the governmental operations of either. Nothing could be more fertile for discord, however, than a failure to define the boundaries of authority. Clashes may and should be minimized

[22] 9 C. F. R. §§ 301.3-21, 301.32-33.

[23] *Id.*, "301.33 Deleterious products seizable. The Secretary of Agriculture will determine whether or not materials being used in the manufacture of process or renovated butter will be deleterious to health or unwholesome in the finished product, If any materials which have been so determined to be deleterious to health or unwholesome in the finished product are found to be present in any process or renovated butter, intended for, or in course of, exportation or shipment in interstate commerce, such process or renovated butter will be confiscated, as provided for in § 301.44."

by mutual tolerance but they are much less likely to happen when each knows the limits of its responsibility. And, it is only reasonable to assume that the theory of denying inconsistent powers to a state is based largely upon the benefits to the regulated industry of freedom from inconsistencies.

Congress hardly intended the intrusion of another authority during the very preparation of a commodity ~~subjected~~ subject to the ~~continuous~~ surveillance and comprehensive specifications of the Department of Agriculture. To uphold the power of the State of Alabama to condemn the material in the factory while it was under federal observation and while federal enforcement deemed it wholesome would not only hamper the administration of the federal act but would be inconsistent with its requirements. Whether the sanction used to enforce the regulation is condemnation of the material or the product is not significant. Since there was federal regulation of the materials and composition of the manufactured article, there could not be similar state regulation of the same subject.[24]

*Reversed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

---

[24] Cf. Charleston & Car. R. R. v. Varnville Co., 237 U. S. 597, 604, — "When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition. . . . ." Erie R. R. Co. v. New York, 233 U. S. 671, 683, — "It is not that there may be division of the field of regulation, but an exclusive occupation of it when Congress manifests a purpose to enter it."

# SUPREME COURT OF THE UNITED STATES.

No. 28.—October Term, 1941.

| | |
|---|---|
| Cloverleaf Butter Company, Petitioner, *vs.* Haygood Patterson, as Commissioner of Agriculture and Industries of the State of Alabama, et al. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit. |

[February [redacted], 1942.]

Mr. Chief Justice Stone.

I think the judgment should be affirmed.

The decision of the Court appears to me to depart radically from the salutary principle that Congress, in enacting legislation within its constitutional authority, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless the state act, in terms or in its practical administration, conflicts with the act of Congress or plainly and palpably infringes its policy. *Sinnott* v. *Davenport*, 22 How., 227, 243; *Mo., K. & T. Ry. Co.* v. *Haber*, 169 U. S. 613, 623; *Reid* v. *Colorado*, 187 U. S. 137, 148; *Savage* v. *Jones*, 225 U. S. 501, 533; *Mo., K. & T. Ry. Co.* v. *Harris*, 234 U. S. 412, 419; *Carey* v. *South Dakota*, 250 U. S. 118, 122; *Atchison Ry.* v. *Railroad Comm.*, 283 U. S. 380, 391; *Townsend* v. *Yeomans*, 301 U. S. 441, 454; *Kelly* v. *Washington*, 302 U. S. 1, 10; cf. *Maurer* v. *Hamilton*, 309 U. S. 598, 614.

We have here no question of an unexercised discretionary power given by Congress to a federal official as the means of regulating interstate commerce, where the full exercise of his authority would conflict with an assertion of the state power. In such circumstances the state's authority to act turns upon the question, which this Court has often been called upon to answer, whether the failure of the federal official to exercise his full power is in effect a controlling administrative ruling that no further regulation by either federal or state government is needful. *Napier* v. *Atlantic Coast Line Ry. Co.*, 272 U. S. 605; cf. *Mintz* v. *Baldwin*, 289 U. S. 346; *Northwestern Bell Telephone Co.* v. *Railway Comm.*, 297 U. S. 471; *Welch Co.* v. *New Hampshire*, 306 U. S. 79.

Here, concededly, the Secretary is exercising all the authority he has. His authority under 32 Stat. 196, 26 U. S. C. § 2325, to seize and condemn is restricted to the manufactured product, "renovated butter". It does not extend to "packing stock butter" intended to be used in making the product. But as construed by the Court the act has deprived Alabama of the power which it would otherwise possess to seize spoiled packing stock butter, without conferring that authority on any federal officer. Thus both the federal and the state governments are left powerless to condemn an article which is a notorious menace to health,[1] a substantial part of which is never shipped out of the state. A congressional purpose to immunize from regulation, state and national, a substance so obviously requiring control is not lightly to be inferred, especially where public health or safety is concerned. *Mintz* v. *Baldwin, supra,* 350; *Kelly* v. *Washington, supra,* 14; *Welch Co.* v. *New Hampshire, supra,* 85.

The Secretary is also given authority by the federal act to inspect the place and process of manufacturing renovated butter, the ingredients going into it, and the renovated product itself, which he may confiscate if he finds it to be deleterious to health. But his authority over packing stock butter before it is used for manufacture is restricted to its inspection. The inspection thus affords a means of determining whether the manufactured product in which packing stock is used and which the Secretary may seize contains a deleterious ingredient, the presence of which in the product can often be ascertained, if at all, only by delicate chemical tests.[2]

The legislative history of the federal act shows what is evident from its words, that its aim is to use the federal power to prevent, by seizure and condemnation, the interstate distribution of renovated butter when found unfit for food. 35 Cong. Rec. 3316, 4586. The grant of authority to the Secretary to inspect the ingredients and seize the product gives no indication of a congressional purpose to hamper state control over the contaminated materials before their manufacture into the finished product. Indeed, Congress not only

[1] A report of August 25, 1933, p. 3, by a member of the staff of the micro-analytical laboratory of the Food and Drug Administration indicated the following contents in three samples of 100 grams each from certain lots of packing stock seized from companies which manufacture renovated butter: (A) 37 fly maggots, 7 rodent hairs, 1 feather, cinders and sand; (B) 4 fly maggots, 1 fly, 2 ants, 1 cow hair, 1 human hair, grass and sawdust; (C) 1 fly maggot, 11 brown ants, 1 human hair, 1 beetle larva, 1 beetle head.

[2] See Note 3, *infra*.

confined the Secretary's authority to make seizures to the renovated product, but in assuming this control it was at pains to provide by 32 Stat. 193, 21 U. S. C. § 25, that the states should be free to exert their police power over the renovated material "in the same manner as though" it "had been produced in such State or Territory." The sponsor in the Senate of the bill containing this provision emphasized that it was not intended to restrict the power of the states, but rather to expand their authority to include original packages in interstate commerce. 35 Cong. Rec. 3605. In the face of these disavowals with respect to the finished product which Congress brought under federal authority, one can hardly infer a congressional purpose to restrict the states' power over the ingredient which Congress did not seek to control; or that Congress could have had any object in denying the states power to seize the offensive ingredient when it left them free to seize the product because it contained the ingredient.

Moreover, not only is there a complete want of conflict between the two statutes and their administration, but it seems plain that the Alabama statute, both by its terms and in its practical administration, aids and supplements the federal regulation and policy. Consequently there is no room for any inference that Congress, by its enactment, sought to stay the hands of the state in the exercise of a power with which the federal act does not conflict. The basic and identical concern of both governments is to protect the consuming public from contaminated butter. If the state seizes unfit packing stock, the federal authorities are relieved of the necessity of detecting it and of seizing the renovated product which it contaminates.[3]

[3] The Assistant Chief of the Bureau of Dairy Industry, in a letter to the Solicitor for the Department, July 22, 1941, which accompanied a proposed bill to give the department authority to condemn filthy ingredients going into renovated butter, said:

> "It is axiomatic that despite the processes through which butter or butter oil pass during the course of manufacturing renovated butter, certain soluble materials unfit for human consumption cannot be removed and it is difficult if not impossible to detect them in the finished product. For example, a lot of butter may be infested with maggots and should be condemned for use in the manufacture of renovated butter. If not, in the melting process fat from these maggots will be mixed with the butterfat and the animal fat may be detected in the finished product only by chemical laboratory tests, if at all."

A representative of the Department, appearing at the House Committee Hearings on the Agricultural Appropriation Bill for the fiscal year ending June 30, 1913, noted another difficulty in locating contaminated renovated butter:

> "But if 500 pounds of rotten packing stock is in a factory, maybe there is 10,000 pounds of other packing stock there; and you can under-

In exercising the powers conferred on him by the Act, the Secretary is not concerned with the quality of packing stock save as it is used in making renovated butter. Seizure of it by the state at the same time removes all necessity and duty of federal inspection, since, in any event, it will never become an ingredient of renovated butter.

The opinion, while recognizing that the Department has long taken the view that it has no power to seize packing stock butter, disregards administrative actualities in assuming that state seizure of it would involve an "intrusion" into the federal domain, which would "hamper the administration of the federal act". The record of administration is not one of belligerency and jurisdictional jealousy, but of active and sympathetic cooperation between state and federal agencies in effecting a common purpose, prevention of the consumption of unfit butter, whether that objective is accomplished by state seizure of the packing stock or federal condemnation of the renovated product.[4] To find in such cir-

---

stand how impossible it is for us to follow through that packing stock so as to be able to identify it when it comes out of the factory and is offered for sale."

Hearings of the House Committee on Agriculture on the Agricultural Appropriation Bill, 62d Cong., 2d Sess., p. 328.

[4] The Memorandum of the Chief of The Bureau of Dairy Industry to the Solicitor of The Department of Agriculture, October 4, 1940, states in part: "The development and perfection during the past few years of new methods for analyzing and examining butter has resulted in increased regulatory activity and action against farm-made or 'packing stock' butter intended for use in the manufacture of process or renovated butter. Certain State regulatory agencies and the Federal Food and Drug Administration have been particularly active.

"The Bureau of Dairy Industry, which is the administrative agency designated by the Secretary of Agriculture to enforce the process or renovated butter act, is entirely sympathetic with the activities of these agencies, although the apparently limiting provisions of Section 5 of the Act of May 9, 1902 (32 Stat. 196), with which this Bureau is primarily concerned, as construed in opinions of your office, have necessarily governed and guided this Bureau in its administrative policy in carrying out the provisions of the Act."

In his Annual Report on Regulatory Work of the Bureau of Dairy Industry, 1940, the Officer in Charge of Dairy Products Inspection reported, p. 4: "In conducting the inspection of all process or renovated butter factories, this office has maintained close contact with . . . local state and city regulatory agencies and officials and whenever possible cooperative action for improvement of conditions have been taken." *Id.*, 1939, p. 4: "The result of State regulatory activity in the South has been beneficial in improving the procurement methods used in getting packing stock butter to the factories. More frequent pickups have been inaugurated and both Atlanta and Birmingham factories have expended hundreds of dollars in new specially made cans with tight fitting covers, and the packing stock received is very much cleaner." *Id.*, 1938, p. 2: "Much of the credit for improvement in quality of packing stock butter belongs to State and Federal regulatory agencies co-

cumstances an intent to restrict state power, not required by the words of the statute, is to condemn a working, harmonious federal-state relationship for the sake of a sterile and harmful insistence on exclusive federal power.

The controlling elements in this case seem identical with those in the application of the Pure Food and Drug Act of 1906, 34 Stat. 768, which this Court has held imposes no restriction on state action which supplements the federal act and does not conflict with its terms or practical administration. In sustaining local regulations requiring the labels placed on animal food stuffs to disclose their ingredients, in addition to the truthful description of the product demanded by the federal act, this Court said: "The requirements, the enforcement of which the bill seeks to enjoin, are not in any way in conflict with the provisions of the Federal act. They may be sustained without impairing in the slightest degree its operation and effect. There is no question here of conflicting standards or of opposition of state to Federal authority." *Savage* v. *Jones, supra*, 539. State regulation yields only when it is in conflict with the administration or terms of the Pure Food and Drug Act. Cf. *McDermott* v. *Wisconsin*, 228 U. S. 115. The same view has been taken in other cases where state and federal governments by concurrent and non-conflicting control over subjects of commerce were seeking to protect the health or safety of the public. *Corn Products Refining Co.* v. *Eddy*, 249 U. S. 427; *Reid* v. *Colorado*, 187 U. S. 137; *Mo., K. & T. Ry. Co.* v. *Haber, supra;* cf. *Whipple* v. *Martinson*, 256 U. S. 41; *Hartford Acc. & Ind. Co.* v. *Illinois*, 298 U. S. 155; *Kelly* v. *Washington, supra.* Such should be our construction of the Renovated Butter Act. It seems ironical for us to say that although state seizures of petitioner's packing stock are not precluded by the judicial and administrative[5] construction of the Pure Food and Drug Act, which authorizes federal confiscation of the filthy ingredient, petitioner has nevertheless discovered an avenue of escape by appeal to

operating in campaigns to improve procurement practices." *Id.*, p. 3: "In conducting the inspection of process or renovated butter factories, this office has maintained close contact with State and city regulatory officials and when deemed advisable cooperative action for improvement of sanitary conditions has been taken."

[5] A report by the officer in charge of the Cereal and Dairy Section, Food Division, of the Food and Drug Administration, to the Commissioner of Food and Drugs, on January 20, 1942, discloses that between July 1, 1933 and January 1, 1942, thirty-six seizures were made of lots of packing stock butter

the Renovated Butter Act which does not authorize federal seizure of the ingredient.

It is one thing for courts in interpreting an Act of Congress regulating matters beyond state control to construe its language with a view to carrying into effect a general though unexpressed congressional purpose. It is quite another to infer a purpose, which Congress has not expressed, to deprive the states of authority which otherwise constitutionally belongs to them, over a subject which Congress has not undertaken to control. Due regard for the maintenance of our dual system of government demands that the courts do not diminish state power by extravagant inferences regarding what Congress might have intended if it had considered the matter, or by reference to their own conceptions of a policy which Congress has not expressed and is not plainly to be inferred from the legislation which it has enacted. Considerations which lead us not to favor repeal of statutes by implication, *United States* v. *Borden Co.*, 308 U. S. 188, 198-9; *United States* v. *Jackson*, 302 U. S. 628, 631; *Posados* v. *National City Bank*, 296 U. S. 497, 503, should be at least as persuasive when the question is one of the nullification of state power by congressional legislation.

Mr. Justice FRANKFURTER, Mr. Justice MURPHY, and Mr. Justice BYRNES join in this opinion.

---

consigned to process butter plants. In commenting upon the extent of state cooperation in such seizures, it was noted that in twenty-one of such cases the packing stock was detained by the state authorities pending the filing by federal officials of a libel for condemnation proceedings under the Pure Food and Drug Act, 21 U. S. C. § 334. These seizures included four lots of packing stock totalling over 5,000 pounds shipped to petitioner, and detained by the Alabama authorities until condemnation proceedings were begun in the federal court.

# SUPREME COURT OF THE UNITED STATES.

No. 28.—October Term, 1941.

| | |
|---|---|
| Cloverleaf Butter Company, Petitioner, vs. Haygood Patterson, as Commissioner of Agriculture and Industries of the State of Alabama, et al. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit. |

[February 2, 1942.]

Mr. Justice Frankfurter.

I agree entirely with the opinion of the Chief Justice. I shall add only a few words on the general bearing of the majority opinion upon the legislative process.

From the very beginning of our government in 1789, federal legislation like that now under review has usually not only been sponsored but actually drafted by the appropriate executive agency. This was true of the Act of August 10, 1912, 37 Stat. 273, amending the Renovated Butter Act. The Department of Agriculture not only urged the enactment of the legislation upon Congress, it drafted its provisions. If the Department wanted Congress to withdraw from the states their power to condemn unsanitary packing stock and to confide such power in the federal government, it could easily have made appropriate provision in the draft submitted by it to Congress. However, the Department did not do so. It did ask Congress to make some restrictions upon the authority which had been exercised by the states in regulating the manufacture and sale of butter for the protection of their citizens. But the restrictions did not include withdrawal from the states of the power to condemn unhealthful packing stock butter. The sponsors of this legislation, the experts of the Department of Agriculture, could have submitted to Congress appropriate language for the accomplishment of that result. They did not do so. The Court now does it for them even though the Department has no such desire.

To require the various agencies of the government who are the effective authors of legislation like that now before us to express

clearly and explicitly their purpose in dislodging constitutional powers of states — if such is their purpose — makes for care in draftsmanship and for responsibility in legislation. To hold, as do the majority, that paralysis of state power is somehow to be found in the vague implications of the federal renovated butter enactments, is to encourage slipshodness in draftsmanship and irresponsibility in legislation.

The majority opinion points out that the successive Solicitors of the Department of Agriculture have uniformly been of the opinion that the Department lacks the power to condemn or destroy unwholesome packing stock butter. If the Department were not content to have the states continue to exercise that power, it would have gone to Congress. In these circumstances it is strange to find in this legislation a denial to the states of powers which the Department has disclaimed and to the exercise of which by the states it has never objected.

The result of this decision is to deny Alabama the power to protect the health of its citizens without replacing such protection by that of the federal government. The CHIEF JUSTICE does well to call attention to the fact that such a construction of the Renovated Butter Act gratuitously destroys the harmonious cooperation between the nation and the states in safeguarding the health of our people. If ever there was an intrusion by this Court into a field that belongs to Congress and which it has seen fit not to enter, this is it. And what is worse, the decision is purely destructive legislation—the Court takes power away from the states but is of course unable to transfer it to the federal government.